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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

VOL. II.

A

DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

THE SECOND EDITION, REVISED AND ENLARGED.

VOLUME THE SECOND,

CONTAINING

Title 13. Estate on Condition.
14. Estate by statute merchant, &c.
15. Mortgage.
16. Remainder.
17. Reversion.
18. Joint-tenancy.
19. Coparcenary.
20. Tenancy in common.

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CHAP. II.

Of the Performance and Breach of Conditions.

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3. *Expressed or implied.*
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60. *Are construed strictly.*
65. *Widows may be restrained from Marriage.*

SECTION 1.

Nature of Conditions.

1 Inst. 201 *a.*

A CONDITION is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does, or does not happen; or in case the granter or grantee does, or omits to do, a particular act, an estate shall commence, be enlarged, or defeated. *Conditio dicitur cum quid in casum incertum qui potest tendere ad esse, aut non esse, confertur.*

Hob. 170.

2. A condition annexed to an estate given, is a divided clause from the grant, therefore cannot frustrate the grant precedent; neither in any thing expressed, nor in any thing implied; which is of its nature incident to, and inseparable from the thing granted.

Expressed or implied.

Lit. § 325.

3. Conditions are either in deed, that is, expressed in the deed by which they are created, or else in law; that is, implied by the common or statute law. Thus where a feoffment or lease is made, reserving rent, payable at a certain day; with a proviso that if it is not paid on that day, the feoffor or lessor may re-enter; this is a condition in deed.

Idem.

1 Inst. 233 *b.*

4. Conditions implied are those which are created by the common or statute law, without any express words. Thus to the grant of every estate is annexed, by law, a condition implied, that the grantee shall not commit felony or treason. Lord Coke says there is a condition in law annexed to every estate tail after possibility of issue extinct, estate by the curtesy, in dower, for life, or years, that if the tenants of these estates alien in fee; or claim a greater estate in a court of record, they shall forfeit them; and the persons in remainder or reversion may enter.

5. As to conditions in law founded upon statutes, it is enacted by the several laws against mortmain,

that the grantee of an estate in fee shall not alien it to an ecclesiastical corporation. By the statute of Marlbridge, tenants for life and years hold their estates upon condition not to commit waste.

Precedent or subsequent. 1 Inst. 216 *a.* 237 *a.* n. 1.

6. Conditions are also precedent or subsequent. Thus where a condition must be performed before the estate can commence, it is called a condition precedent. But where the effect of a condition is, either to enlarge or defeat an estate already created, it is then called a condition subsequent.

7. Where a particular estate is limited, with a condition that upon the performance of a certain act, or the happening of a certain event, the person to whom the estate is limited shall thereupon have a larger estate than what was originally limited to him; such a condition is precedent, and good under certain circumstances; which will be noticed in a subsequent title. Tit. 16. c. 2.

8. With respect to the words by which conditions may be created, they will be stated hereafter. Tit. 32. c. 24.

To what Estates annexed.

9. A condition in deed may be annexed to every species of estate and interest in real property: to an estate in fee, in tail, for life, or for years, in any lands or tenements.

At what time. 1 Inst. 236 *b.*

10. As to things executed, a condition must be created and annexed to the estate at the time of the making of it, not at any time after; therefore where a condition is made in a separate deed, it must be sealed and delivered at the same time with the principal deed. Touch. 126.

Rot. Parl. vol. 3. p. 61.

11. In a celebrated case which was heard in Parliament 2 Rich. II. it appeared that King Edward III. had made a feoffment in fee, to the Duke of Lancaster and others, without any condition; and afterwards required the feoffees to perform certain con-

ditions. All the judges and serjeants being summoned, and required to give their opinion on this case, declared that the feoffees were not obliged to perform the conditions; because they were not expressed at, or before, the time when the feoffment was made.

1 Inst. 237 *a*.

12. As to things executory, such as rents, annuities, &c. it is held that a grant of them may be restrained by a condition, created after the execution of such conveyance.

A Condition must defeat the whole Estate.

1 Rep. 86 *b*.

Touch. 127.

13. It is a rule of law, that a condition must defeat or determine the whole of the estate, to which it is annexed; not determine it in part only, and leave it good for the residue. Therefore if a feoffment be on condition that upon such an event the feoffor shall enter, and have the land for a time; or the estate shall be void for part of the time: or a lease be for ten years, provided that upon such an event, it shall be void for five years: these conditions are not good. Yet if a feoffment is made of two acres; provided that upon such an event the estate shall be void as to one acre only, this is a good condition.

Jermin v. Arscott. 1 Rep. 85. 6—40.

14. In consequence of this principle it has been adjudged that a condition to determine an estate tail, as if the tenant in tail were dead, was void; because the death of a tenant in tail did not determine the estate tail, but his death without issue.

Can only be reserved to the Donor, &c.

1 Inst. 214 *a*.

15. A condition, or the benefit of a condition, can only be reserved to the donor, feoffor, or lessor, and their heirs; not to a stranger. For it is a maxim of law, that nothing which lies in action, entry, or re-entry, can be granted over; in order to discourage maintenance. And when, in the creation of a condition, no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs

of the donor, feoffor, or lessor: for as these are the persons prejudiced by the disposition, it is but reasonable that they should be entitled to the same means of recovering the estate, as their ancestors.

16. Thus Littleton says, if a man lets land to another for life, by indenture, rendering rent, with a condition of re-entry in default of payment; if afterwards the lessor grants the reversion to a stranger, and the tenant for life attorns, such grantee cannot take advantage of the condition, as the lessor or his heirs might have done, if the reversion had continued in him. But now by the statute 32 Henry VIII. c. 34. grantees of reversions, and privies in estate, are enabled to take advantage of the breach of conditions, of which an account will be given in the next chapter. § 347.

17. Conditions are sometimes void in their creation, as where they are impossible, or something is required to be done which is contrary to the divine law, or the municipal law. What Conditions are void.

18. All the instances of conditions against law are reducible under one of these heads. 1. To do something that is *malum in se*, or *malum prohibitum*. 2. To omit doing something that is a duty. 3. To encourage such crimes and omissions. Conditions of this kind the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes. Conditions against Law. 1 P. Wms. 189.

19. A condition repugnant to the nature of the estate to which it is annexed, is void in its creation. Thus a feoffment in fee, upon condition that the feoffee shall not take the profits, is void, as repugnant and against law; and the estate given is absolute. Repugnant to the Nature of the Estate. 1 Inst. 206 *b*.

20. A lease was made to A. B. and C. with a proviso that if C. should demand any profits of the lands, or enter into the same during the life of A. or B. Moor v. Savill. 2 Leon. 132.

(who were his father and mother,) that then the estate limited to C. should cease and be utterly void. It was resolved that this was a condition, and was void, being repugnant to the estate limited.

Dyer, 343 *b.* Jenk. 243.

21. A condition annexed to the gift of an estate tail, that the donee shall not marry, is void; for, without marriage he cannot have an heir of his body. It would be otherwise if such a condition were annexed to the grant of an estate in fee simple; for in that case a collateral heir may inherit.

Lit. § 360. 8 Term R. 61.

22. A condition annexed to the creation of an estate in fee simple, that the tenant shall not alien, is void; being repugnant to the nature of the estate given; for a power of alienation is an incident inseparably annexed to an estate in fee simple. But a condition that a tenant in fee simple shall not alien to a particular person, is good: for Littleton says, such a condition does not take away all power of alienation.

Lit. § 361.

1 Inst. 223 *b.*

23. Whatever is prohibited by law, may be prohibited by condition: Therefore if a feoffment be made in fee, upon condition that the feoffee shall not alien in mortmain, this is a good condition; because such alienation is prohibited by law. Lord Coke observes, that in antient deeds of feoffment in fee simple, there was a clause—*Quod licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis et Judæis.*

1 Inst. 223 *b.*

24. If a man makes a feoffment to a husband and wife in fee, upon condition that they shall not alien; to some intent this is good, and to some intent void. For to restrain an alienation by feoffment or deed is good, because such an alienation is tortious and voidable; but to restrain their alienation by fine, is repugnant and void; because it is lawful, and unavoidable.

Lit. § 362.

25. If lands be given in tail, upon condition that

neither the tenant in tail, nor his heirs, shall alien in fee, or in tail, or for the term of another's life, but only for their own lives, such a condition is good; because these alienations are contrary to the statute *De Donis.* Tit. 2. c. 2.

26. So if a person make a gift in tail, upon condition that the donee shall not make a lease for three lives or 21 years, according to the statute 32 Hen. VIII. the condition is good; for this power being given collaterally, is not incident to the estate; and may therefore be restrained by condition. 1 Inst. 223 *b.*

27. But if an estate tail be created with a condition that the tenant in tail shall not suffer a common recovery, the condition is void; because the right to suffer a common recovery is an incident inseparably annexed to an estate tail. Idem. Tit. 36.

28. Lord Coke says, although a condition repugnant to the nature of the estate granted, is void; yet that in all such cases a bond, by which the obligor is restrained from doing that which the nature of the estate granted entitled him to do, will be good. Thus if a feoffee in fee becomes bound in a bond not to take the profits of the land, or not to alien, such a bond would be good. Whether in such cases a Bond is good. 1 Inst. 206 *b.*

29. The same law was held by the court of chancery in the following case.

A father settled lands upon his son in tail, and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good; because if the son had not agreed to give the bond, the father might have made him only tenant for life. Freeman v. Freeman. 2 Vern. 233.

30. This doctrine appears extremely questionable, as it offers an obvious mode of restraining a person from those rights over an estate which the common

law gives him; consequently of frustrating the common law, as fully as if a condition of this kind were allowed to be inserted in a conveyance of land, and in some cases it appears not to have been allowed.

Poole's Case, Moo. 810.

31. Thus where an elder brother voluntarily gave land to his second brother, and the heirs of his body, remainder to a younger brother in like manner; and made each of them enter into a statute with the other, that he would not alien, &c.; but because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke.

Jervis v. Bruton, 2 Vern. 251.

32. So where A. settled lands on B. in tail, with remainder to his own right heirs; and took a bond from B. not to commit waste; the bond being put in suit, it was decreed to be delivered up to be cancelled; the Court saying it was an idle bond.

Conditions of Non-alienation sometimes good. Hob. 170. 1 Inst. 204 *a.* 223 *b.*

33. It was formerly held, that if a lease was made to a man and his assigns, he could not be restrained from alienation; but if the word assigns was omitted, he might then be restrained. It is however laid down by Lord Coke, that if a person made a lease for life or years, with a condition that the lessee should not grant over his estate, or let the lands to any other person, it would be good; and this doctrine is now fully established.

More's Case, Cro. Eliz. 26.

34. A lease was made for years upon condition that the lessee, his executors or assigns, should not alien, without the assent of the lessor. The lessee died intestate; the ordinary granted administration to J. S. who assigned the lease without licence. It was adjudged that the condition was broken, for J. S. was an assignee in law.

Berry v. Taunton, Cro. Eliz. 331.

35. A condition annexed to an estate for years, that if the lessee, his executors or assigns, did demise

the land for more than from year to year, then the lease should cease, and be void; was held to be good.

36. A condition was inserted in a lease for years, that if the lessee, his executors or administrators, at any time, without the assent of the lessor, his heirs or assigns, did grant, alien, or assign the land, or any part thereof, that then it should be lawful for the lessor and his heirs to re-enter. This was held to be a good condition. Pennant's Case, 3 Rep. 64.

37. Conditions of this kind are not favoured, but construed strictly. They only affect the original lessee, and do not extend to his assignee. So that if a lessee who is restrained from alienation by a condition of this kind, assigns over his term, with the consent of the lessor; such assignee may assign to any other person, without farther consent. But are construed strictly.

38. The president and scholars of a college at Oxford made a lease for years to one Bold, with a proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special licence of the lessors. Afterwards the lessors by their deed licensed the lessee to alien or demise the land to any person or persons whatever. The lessee assigned the term to one Tabbe, who devised it to his son, who was also his executor. The son entered generally, died intestate, and his administrator assigned the term to the defendant. The president and scholars entered for the condition broken. It was resolved that the alienation by licence to Tabbe had determined the condition; so that no alienation afterwards made by him could be a breach of the proviso, or give the lessors a right of entry: for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. Dumpor's Case, 4 Rep. 119.

Whichcot v. Fox, Cro. Jac. 398.

39. George Fox, lessee for 99 years, by indenture, rendering rent, covenanted that he would not alien or assign his term, or any part thereof, to any but his brothers. The lessee assigned the term to one of his brothers, who assigned it over to a stranger. It was resolved, 1. That this was a condition, and not a covenant; 2. That the assignee was not within the condition; but might alien to whom he pleased.

ante, § 35.

40. In the case of Berry v. Taunton, the condition was held to be broken by a devise of the land to the lessee's son. But in a subsequent case, where a lessee for years covenanted with the lessor not to assign over his term, without the lessor's consent in writing; and afterwards without such consent devised the term to J. S.; it was said that this was not a breach of the covenant; for a devise was not a lease.

Fox v. Swann, Styles, 483.

Do not extend to an Underlease.

41. Where there is a condition in a lease that the lessee shall not assign it over, without the permission of the lessor, an underlease has been adjudged not to be within the condition.

Crusoe v. Bugby, 3 Wils. R. 234. 2 Black. R. 766.

42. In a lease for 21 years there was a covenant from the lessee, that he would not "assign, transfer, or set over, or otherwise do or put away the said indenture of demise, or the premises thereby demised, or any part thereof, to any person or persons whomsoever, without the licence and consent of the lessor." The lessee demised the premises for 14 years without any licence: it was held that this underlease was not a breach, for the Courts had always looked nearly into these conditions.

Unless there are special Words.

43. But if a lease contains a proviso that the lessee, his executors or administrators, shall not let, set, or assign over the whole or any part of the premises, without leave in writing from the lessor, on pain of forfeiting the lease; an administrator of the lessee cannot make

an underlease: nor would a parol licence to let part of the premises discharge the lessee from this restriction.

44. William Gregson demised the premises in question to S. Harrison, his executors, &c. for 21 years, with a proviso that in case the said Harrison, his executors or administrators, should at any time during the said term *set, let, or assign over* the demised messuage, or any part thereof, without the licence and consent of Gregson, his executors, administrators, or assigns, for that purpose first had and obtained in writing, the lease should be absolutely null and void; and the lessor might enter. The lessee entered and died, the defendant took out administration to him, became possessed of the demised premises, and made a lease of them for nine years. The landlord died, having devised the premises to the lessor of the plaintiff, who brought an ejectment to recover them, as being forfeited by the lease made by the administrator. The defendant proved that Gregson, the lessor, gave liberty by *parol* to Harrison the tenant to let the stable, being part of the premises demised, but refused to give the like liberty to demise any other part of the premises.—Mr. Justice Ashurst was of opinion, that there was no sufficient answer to the plaintiff's claim. First, it was objected that the covenant only extended to an assignment of the whole term; but that was not to be collected from the words of the proviso, which were, "That the tenant should not set, let, or assign *over* the said premises, or any part thereof," &c. Now the word *over* was annexed to the word assign. The covenant necessarily meant, that if the lessee parted with the premises, even for a part of the term, his lease should be vacated; the assignment by the administrator must therefore be

Roe v. Harrison, 2 Term R. 425.

considered as a breach of the condition. It was then objected, that the proviso not to assign did not extend to persons who came into possession by operation of law; but only to prevent an assignment in fact by the party. It was however impossible to argue against the express stipulation of the parties. There was no doubt but that it was competent to the parties to bind their representatives; and the covenant was, that neither the lessee, nor his executors, nor his administrators, should let, &c. Therefore, for the purpose of an assignment, the term never could be considered as legal assets in their hands. If indeed the word executors had not been inserted in the proviso, but it had been confined to an assignment by the lessee himself, it might have been doubted whether the restriction would have extended to this case. Another objection taken was, that the lessor gave licence to the tenant to let *part* of the premises, and that licence destroyed the whole condition. But this was not such a licence to alien as fell within the terms of the proviso. The express words were, "licence or consent in writing," whereas this was only a licence by parol; therefore it was not a legal licence according to the terms of the covenant.—Mr. Justice Buller said, the first question was, whether the words of the covenant were to be confined to an assignment of the whole term. It had been contended that no forfeiture could be incurred by letting for a shorter period than the whole term; but no authority had been cited to warrant the Court in striking out the words, "let and set." The case of Crusoe v. Bugby, though pretty strong, did not come up to this one; for there the word let, was not used: but that was a material word here, and the Court could not reject it. With respect to the lessor's

ante, § 42.

consent to let part of the premises, which, it was contended, waived the forfeiture of the whole, it was not a legal consent. Judgement was given for the plaintiff.

A Sale by Execution is not an Alienation.

45. Where a lessee covenanted not to alien or transfer away his lease, and afterwards acknowledged a judgement, on which the lease was taken in execution, and sold; it was held that this sale was not a forfeiture of the lease.

Doe v. Carter, 8 Term R. 57.

46. On a trial in ejectment, a verdict was found for the lessor of the plaintiff, subject to the following case: The lessor of the plaintiff demised the premises by lease, in which there was a covenant that the lessee, his executors, administrators or assigns, should not let, set, assign, transfer, make over, barter, or exchange, or otherwise part with the lease, or the lands, or any part thereof, to any person or persons whatever, without the special licence and consent of the lessor, his heirs or assigns, with a power of re-entry in case of alienation. A creditor of the lessee took from him a warrant of attorney to confess a judgement, upon which a judgement was entered, and the lease was sold by execution, to a person who had notice of the proviso. The lessor brought an ejectment against the purchaser of the lease. Lord Kenyon said, there was a distinction between those acts which the party does voluntarily, and those which pass *in invitum;* that judgements, in contemplation of law, always pass *in invitum;* that this was not an alienation within the meaning of the covenant: and judgement was given for the defendant.

Unless there is Collusion.

47. But where a warrant of attorney to confess a judgement is given by collusion, for the purpose of enabling a creditor to take a lease in execution under

a judgement, it will be deemed a breach of a condition against alienation.

ante, § 46. 8 Term R. 300.

48. In the case of Doe v. Carter, the landlord brought a new ejectment: the jury found the same facts, with this addition, that "the warrant of attorney was executed for the express purpose of getting possession of the lease," and the tenant concurred in that intention.

Lord Kenyon—"When this case first came before the court, the rules that were likely to govern it were so explicitly stated, that I thought we should have heard no more of it. The covenant not to assign, and the proviso to enforce it, were both legal at the time; and indeed it was prudent for the landlord to take this care, that an improper tenant should not be obtruded on him. When the former question arose, the court, to a certain degree, relaxed the severity of the covenant, and they then said there was no forfeiture, because all that was stated was, that a fair creditor had used due diligence to enforce the payment of a just debt, and that the lease was taken from the tenant, against his consent, by judgement of law. But when it is now stated that this step was taken for the express purpose of getting possession of the lease, and that the tenant consented to it, it would be ridiculous to suppose that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies, that that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not, by any assignment, underlease, or mortgage, have conveyed his interest to a creditor; consequently he cannot convey it by an attempt of this kind. If the lease had been taken by a creditor, under an adverse judgement, the

tenant not consenting, it would not have been a forfeiture; but here the tenant concurred throughout, and the whole transaction was performed for the very purpose of enabling the tenant to convey his term to the creditor."—Judgement was given for the plaintiff.

A Lease may determine by Bankruptcy.

49. A condition, in a lease for years, that the landlord shall re-enter, on the tenant's committing an act of bankruptcy, whereupon a commission shall issue, is good.

Roe v. Galliers, 2 Term R. 133.

50. It was found by a special verdict, that in a lease for 21 years, a proviso was inserted, that if the lessee, his executors or administrators, should commit any act of bankruptcy, within the intent and meaning of any statutes made or to be made in relation to bankrupts, whereon a commission should issue, and he or they should be found or declared to be a bankrupt or bankrupts, then it should be lawful for the lessor to re-enter. The lessee became a bankrupt: the question was, whether the lease was thereby determined.

Mr. Justice Ashurst said, the general principle was clear, that the landlord, having the *jus disponendi*, might annex whatever condition he pleased to his grant, provided it was not illegal, or unreasonable. Then was this proviso contrary to any express law, or so unreasonable that the law would pronounce it to be void: that it was not against any positive law was admitted, and no case had decided it to be illegal. It remained to be considered whether it was void or unlawful, as against reason or public policy. It did not appear to be against either. First, it was reasonable that a landlord should exercise his judgement with respect to the person to whom he trusted the management of his estate; a covenant therefore not to assign was legal: covenants to that effect were

frequently inserted in leases, and ejectments every day brought on a breach of such covenants. The landlord might very well provide that the tenant should not make him liable to any risk by a voluntary assignment, or by any act which obliged him to relinquish the possession. If it was reasonable for him to restrain the tenant from assigning, it was equally reasonable for him to guard against such an event as bankruptcy, because the consequence of it was an assignment of the property into other hands. Perhaps it might be more necessary for the landlord to guard against the latter event, as there was greater danger to be apprehended in that, than in the former case. Persons who were put into possession under a commission, were still less likely to take proper care of the land, than a private assignee of the first tenant, neither was there any reason of public policy to be urged against allowing such a proviso; it conduced to the security of landlords, which could never be urged as a ground of objection on that head. He was therefore of opinion that it was a valid proviso.

Mr. Justice Buller said, the case had been argued on general principles of inconvenience, because the possession of an estate on such terms enabled the tenants to hold out false colours to the world; but that observation did not apply to the case of land, for a creditor could not rely on the bare possession of the land by the occupier, unless he knew what sort of interest he had in it. If he were desirous of knowing that, he must look into the lease itself; there he would find the proviso, that the tenant's interest would be forfeited in case of his bankruptcy.

The stock upon the farm might indeed induce a credit, but that would not govern the present case. It was next urged that this was equivalent to a pro-

viso that the lease should not be seized under a commission of bankruptcy; the defendant's counsel having first supposed the lease to be granted absolutely, for a certain term, and then that a subsequent proviso was added to that effect. Such a proviso as that indeed would be bad, because it would be repugnant to the grant itself; but here there was an express limitation that the lease should be void, upon the fact of the lessee's becoming a bankrupt. It was clear that the landlord in this case parted with the term, on account of his personal confidence in the tenant; that was manifestly the case in all leases where clauses against alienation were inserted. The landlord perhaps relied on the tenant's honesty, or he approved of his skill in farming, and thought he would take more care of the farm than another; therefore he had a right to guard against the event of the estate's falling into the hands of any other person, who might not manage it so well as the original tenant. Suppose a lease were made for 21 years, on condition that the tenant should so long continue to occupy the land personally; there could be no objection made to such a condition; for the personal confidence was the very motive for granting the lease, and that was like this case. If such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity. But the principal ground was, that this was a stipulation, not against law, nor repugnant to any thing stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which it was competent for the lessee to make. Adjudged that the condition was good.

Tit. 32. c. 5.

51. In many of the cases where a lease may be avoided on breach of a condition, acceptance of the rent will make the lease good.

Conditions against Marriage.

52. The ecclesiastical courts, in conformity to the Roman law, considered all conditions in restraint of marriage as contrary to the public good, and therefore void. The Court of Chancery first adopted the same doctrine in cases of legacies; but always held that a condition annexed to a devise of land, or of any interest arising out of land, not to marry without consent, was good. That where such a condition was precedent, the estate did not vest till the condition was performed. Where it was subsequent, the estate would be divested by the breach of the condition.

Fry v. Porter. 1 Cha. Ca. 138. 1 Mod. 300.

53. Lord Newport devised an estate to his wife, for her life; after her death, to his grand-daughter, Lady Ann Knowles, and the heirs of her body; provided and upon condition that she married with the consent of his wife, the Earl of Warwick, and the Earl of Manchester; in case she married without such consent, then he devised the premises to another person. The grand-daughter married without consent. It was decreed by Sir H. Grimstone, M. R. that the condition was only *in terrorem*, and the estate not forfeited. Upon an appeal, Lord Keeper Bridgeman, assisted by Keeling, Vaughan, and Hale, reversed the decree. Hale said, that though by the civil law, in a case of mere personalty, such a limitation over would be void; yet this, being a devise of lands, was not to be governed by that law.

Bertie v. Faulkland, 3 Cha. Ca. 129.

54. Mr. Cary devised his estate to trustees and their heirs, in trust for Elizabeth Willoughby, for her life, in case that within three years after the testator's

death, she married Lord Guilford; but in case the marriage did not take effect within that time, then he devised the estate to Lord Faulkland. Upon the death of the testator, proposals of marriage were made by Miss Willoughby's friends to Lord Guilford, which being refused, she married Mr. Bertie. Lord Somers, assisted by Justices Holt and Treby, held, that as this was a good condition precedent, and not performed, no relief could be given to the young lady; that the estate must go over to the next in remainder, this being a condition of marriage, which was a thing that could not be valued. It appears from the Journals, that this decree was reversed in the House of Lords.

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55. J. S. charged his real estate with 500*l.* to be paid to his sister, Alice Herne, within one month after her marriage, but so nevertheless as she married with the approbation of his brother, if living; and in case she married without his consent, the 500*l.* was not to be raised. Alice Herne married in the lifetime of her brother, without his consent; the question was, whether she was entitled to the 500*l.* or not; for it was said that this was a condition only *in terrorem*; that the construction of such a condition always had been, where there was no devise over, that such a condition was void; otherwise where limited over; and here it was not. On the other side it was argued that this was a condition precedent, and nothing arose or became due but upon the marrying with consent; that being a devise of money out of land, or of a charge upon land, it was to be considered as a devise of land, and to be governed by the same rules; then being a plain condition precedent, nothing arose. And for this were cited the two preceding cases. Sir Joseph Jekyll held that the charge being

Reeves v. Herne, 5 Vin. Ab. 343. 4 Geo. 2.

upon land, the case was to be decided by the same rule as if it had been a devise of land; and being plainly a condition precedent, nothing vested: for it would be too hard to charge the land, contrary to the express will of the testator, and to say, the money should be raised, when the testator said it should not. Decreed accordingly.

56. The validity of conditions in restraint of marriage without consent, was also established, in the case of a trust term, created for the purpose of raising portions for daughters, by the following determination.

Harvey v. Aston, 1 Atk. 361. Com. R. 726. Willes R. 83.

57. Sir Thomas Aston settled his estate to the use of himself for life, remainder to trustees for a term of years, upon trust, in case he should have no son, and should have two daughters, living at the time of his death, that the trustees of the term should raise for such daughters 2000 *l.* a piece, if they married with the consent of their mother; and if either of them died before marriage, with such consent, her portion to cease, and the premises to be discharged; or if raised, then to be paid to the person to whom the premises should belong. Sir T. Aston gave, by his will, to each of his daughters, an additional portion of 2000 *l.* subject to the like condition as in the settlement; he died, leaving two daughters, who married without the consent of their mother; and afterwards filed a bill in Chancery against the trustees of the term, and their father's executors, to have their portions raised. It was answered, that the two daughters had married without the consent of their mother, although they and their husbands were informed, previous to their respective marriages, of the clause by which they were restrained from marrying, without such consent.

Sir Joseph Jekyll decreed, that the plaintiffs were entitled to their original portions, as well as to the additional portions given by the will.

Upon an appeal, Lord Hardwicke, assisted by Lord Chief Justice Willis, Lord Chief Justice Lee, and Lord Chief Baron Comyns, determined that the daughters of Sir Thomas Aston were not entitled to these portions, in consequence of their marriage without their mother's consent.

Lord Chief Baron Comyns said, the intention of Sir T. Aston was perfectly clear, that his daughters should not take portions if they married without consent. The objection which had been most relied on was, that in the civil law, restrictions of this kind were looked on as unlawful; and that the doctrine of the civil law had been adopted by the Court of Chancery. In cases of pecuniary legacies, that court had indeed in some points adopted the rules established in the ecclesiastical courts; but even on this subject that court had not adopted the rules of the civil law; for where a legacy was given upon condition of marriage, with consent, with a devise over of the legacy, on breach of the condition, the condition had been held good. It was a known maxim, that where the estate was to arise upon a condition precedent, it could not vest until the condition was performed: this had been so strongly adhered to, that even where the condition was become impossible, no estate should grow thereon.

Lord Chief Justice Willes said, that two points had been made on this case. 1. If it was the intention of Sir T. Aston that his daughters should have their portions, whether they married with consent or not. 2. If it was his intention that they should not; then whether this intent was agreeable to the rules of law.

and equity. As to the first, there could be no doubt either upon the settlement, or the will. As to the second point, to begin with the will, the rule was, that *voluntas testatoris totum est;* if not inconsistent with the rules of law and equity; and they should be very plain indeed, to defeat the intention of the testator. The restraint in this case must be taken to be either a condition precedent, or a limitation of the time of payment; if the first, the case of Bertie v. Faulkland was in point; if it was taken as a limitation of the time of payment, and that seemed the proper construction, then even the civil law would not say that they were now entitled, because the time was not come.

ante, § 54.

Lord Chief Justice Lee said, there were three sorts of conditions to be rejected. 1. Such as were repugnant. 2. Such as were impossible in their creation. 3. Such as were *mala in se.* But this condition of marrying with consent did not come under any of those heads; and in Fry v. Porter it was admitted that such a condition was good in respect of land. That though where a compensation could be made, it was true there was but little difference between conditions precedent and subsequent, yet where a condition was annexed to a portion, in order to have a marriage with consent, there was an equitable difference. In the case of a condition subsequent, the thing was vested; and though in the nature of a penalty, yet the intent should be clear and plain, by an express devise over to divest it: But in the case of a condition precedent, for which there could be no compensation, it would be giving an estate against the intent of the donor, to dispense with the condition. There were no words to vest the portions in the daughters till a marriage with consent; and he

ante, § 53.

very much governed his opinion by the particular penning of the deed, which had made this a condition precedent; and had vested nothing in the daughters till a marriage with consent. Upon the whole, therefore, he was of opinion that a condition to marry with consent was a lawful one; that it was annexed to these portions; that it was a condition precedent; and that nothing could vest in the plaintiffs, till that condition was performed.

Lord Hardwicke said he agreed with the judges in opinion, and held that nothing was more fixed, since the case of Pawlet v. Pawlet, than that portions charged on land would not vest till the time of payment came, which in this case was not till a marriage with consent; therefore there was no rule in law or equity that could excuse the want of such consent. That there was no such rule where they were given over, had been clearly proved; and the ordering that the estate should be exonerated, he thought, was equal to a devise over. But admitting that there was no devise over, then the question would be, whether this condition was *in terrorem* only. He said he did not know that the rule obtained so generally as had been laid down; he had understood it only of legacies, and not of portions. These portions arose out of land, and had nothing testamentary in them, so were not subject to the jurisdiction of the ecclesiastical court; nor to be governed by the rules of the civil law; but were subject only to the rules of the common law. If Sir T. Aston had expressly limited the term to his daughters, on their marrying with consent; the term could never arise, until they were so married. Why had he not the same power over the trust of the term, as over the term itself?—. The decree was reversed. 1 Vern. 204.

Reynish v. Martin, 3 Atk. 330.

58. In a subsequent case, a woman devised in these words—"Provided always, and it is my will, if my daughter Mary marry by and with the consent of the trustees, signified in writing before such marriage had, then and not otherwise, I give and devise unto my said daughter Mary the sum of 800*l.*;" and charged all her real estates with the payment of her debts and legacies. Mary married without the consent of the trustees, and died soon after; but before her death the trustees declared their consent and approbation. On a bill filed by Reynish for payment of this legacy, Lord Hardwicke said; as Mary married without the consent of the trustees, their consent or approbation afterwards was immaterial, because no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it.

If the legacy was to be considered as a charge originally upon the lands, it must have the same consideration as a devise of lands would have: in that case nothing could be clearer than that the legacy could not be raised; because nothing vested before the condition performed.

Perrin v. Lyon, 9 East, 170.

59. The Court of King's Bench, upon a case lately sent out of Chancery, was of opinion that a condition, restraining a lady from marrying a native of Scotland, was good.

Are construed strictly.

60. Conditions in restraint of marriage are however so far discouraged by the English law, that they are construed strictly, in favour of the persons on whom such restraints are laid.

Clerk v. Lucy, 5 Vin. Ab. 87.

61. J. S. having four daughters, A. B. C. and D., devised several parcels of his estate to his four daughters; and, among other devises, he gave to his trustees his lands in E. and F., in trust for his daughter A., until her marriage or death; and in case

she married with the consent of the trustees, then to her and her heirs; but in case she should marry without their consent, then to her other sisters equally between them. Three years after the date of the will, A. married with the consent and approbation of her father, who settled upon this marriage part of the lands which he had devised to her, and some other property. A year after J. S. died, without having altered his will; it was objected that this was a condition precedent, and until performance the estate could not vest, and that equity ought not to aid in such a case.

Lord Cowper held that by the marriage with the consent of the father, the condition was dispensed with, and the devise became absolute: for conditions of this kind, whether precedent or subsequent, were in the nature of penalties or forfeitures; if the substantial part and intent was performed, equity would supply small defects and circumstances; and favour the devisee. Here was no forfeiture: it was never the intent of the testator that the estate should be taken from the first devisee, when it could not go to the devisee over; and be let to descend to the heir at law.

62. A person devised all his lands to one Comyns and his heirs, to the use of him and his heirs, in trust for payment of debts; and afterwards in trust for his grand-daughter Mary, and the heirs of her body, remainder to Comyns and his heirs, upon condition that he should marry the testator's grand-daughter Mary. Comyns offered to marry the lady, but she refused, and soon after married another person.

Robinson v. Comyns, Forrest, 164.

Lord Talbot was of opinion that this was a condition subsequent, and that it was dispensed with by the refusal of the lady.

Daly v. Desbouverie, 2 Atk. 261.

Long v. Dennis, 4 Burr. 2052.

63. A person devised his estate to trustees, to the use of his son Robert for life, remainder to the wife of such son for life, remainder to the first and other sons of his said son in tail; with a proviso that if the son should marry any woman not having a competent marriage portion, *or*, without the consent and approbation of the said trustees, their heirs and assigns, in writing under their hands and seals, first had and obtained; then his trustees, immediately after the decease of his son, should stand seised of the premises, to the use of the testator's two daughters; and he declared that the said proviso or condition was not intended by him, or to be construed or taken to be *in terrorem*; but a condition in want of performance whereof in every respect, the estate should in no case be vested in his son, nor the heirs of that marriage. The son married a woman who had a competent portion, but without the consent or approbation of the trustees. Upon the death of the son, the daughter claimed the estate under the condition in the will.

Lord Mansfield— "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigour and strictness; they are contrary to sound policy; by the Roman law they are all void. Conditions precedent must previously exist; therefore in these there can be no liberality, except in the construction of the clauses. But in cases of conditions subsequent, it has been established by precedents, that where the estate is not given over, they shall be considered as only *in terrorem*. This shews how odious conditions are; for in reason and argument the distinction between being and not being limited over, is very nice; and a clause can carry very little terror which is adjudged to be of no effect. If the

estate is given over, such a condition cannot be got over. The present case is doubly *in terrorem*, and made so by adding the clause, that the said proviso or condition was not intended by him, nor to be construed or taken to be *in terrorem*. In the case of Daly v. Clanrickarde in Chancery, 10th December 1738, the condition was, that he should marry with the consent of trustees; if not, the estate was given over. The trustees were applied to; they offered to agree, on a proper settlement being made; the marriage was had without their knowledge; but the settlement being afterwards made, their conditional consent was holden to be sufficient. In the case of Bolton et Ux. v. Humphries et al. 20th February 1755, in Canc. the condition was, that if she married with the consent of N. H. in writing, then, &c. and the estate was given over. She married without his privity, but he gave his consent as soon as he knew of the marriage. Lord Hardwicke held this a sufficient consent, to entitle her to the real and personal estate, which was given her if she married with the consent and approbation of N. H. to be signified in writing. I mention these cases to shew that the court ought not to make strides in favour of a forfeiture. There can be but one true legal construction of these conditions, and therefore it must be the same in the Court of Chancery, and all the other courts in Westminster Hall. The meaning of the testator, or the controul which the law puts upon his meaning, cannot vary, in what court soever the question chances to be determined. In the present case the forfeiture is so cruel as to begin with the innocent issue of the offender; who is to have it for his own life at all events. This testator considered money as the only qualification of a wife; but he still means to leave it to the judgement of the trustees,

2 Atk. 261.

whether there might not be some equivalent for money: he only meant to require their sanction, in case his son married a woman without a competent fortune. This is undoubtedly a condition precedent; it must have been performed before the son could take, before his interest could vest. The construction must be to vest the estate, in case his son married a woman with a competent fortune, *or*, had the consent and approbation of his trustees, to marry a woman without one. The blunder is in the penning only; the meaning is, that in either event it shall vest: the performance of *either part* of the alternative vests the estate. Here is no objection to the marriage, and one of the trustees is become one of the devisees over; therefore a cause of objection ought to be shewn, otherwise it shall be considered as if his consent was withholden without reason. The consequence is, that judgement must be given for the defendant."

The three other Judges concurred in thinking it to have been the intention of the testator, that his son's complying with either part of the alternative, should be a performance of the condition; that he did not incur a forfeiture, unless he had broken both parts of it; and that conditions in restraint of marriage ought to be construed with the utmost rigour and strictness.

O'Callaghan v. Cooper, 5 Ves. 117.

64. In a modern case of personal property, it was held that the same principles of policy which annul conditions that tend to a general restraint of marriage, will favour and support them, when they merely prescribe such provident regulations and sanctions, as tend to protect the individual from those consequences to which an overhasty, rash, or precipitate match would probably lead. Therefore if the conditions are only such, whereby a marriage is not altogether pro-

Scott v. Tyler. Hargr. Jur. Arg. vol. 1. 22. Dick. 712.

hibited, but only in part restrained; as in respect of time, place, or person; then such conditions are good. An injunction to ask consent is lawful, as not restraining marriage generally. A condition prescribing due ceremonies, and place of marriage, is good, which only limits the time to the age of twenty-one, or any other reasonable age, provided it be not used evasively to restrain marriage generally.

65. A condition restraining a widow from marriage generally is good.

Widows may be restrained from Marriage.

66. R. H. devised certain lands to his wife and her heirs; but if she married again, then he devised those lands to his daughter in fee. The wife married again; it was adjudged that the estate should go over to the daughter.

Fitchett v. Adams, 2 Stra. 1128.

TITLE XIII.

ESTATE ON CONDITION.

CHAP. II.

Of the Performance and Breach of a Condition.

1. *How to be performed.*
6. *Who may perform it.*
11. *At what Time.*
13. *At what Place.*
16. *Who are bound to perform it.*
19. *Effect of the Performance of a Condition.*
20. *What excuses the Non-performance of a Condition.*
32. *Equity relieves against Conditions.*
37. *Where Equity will not relieve.*
41. *Of an Entry for a Condition broken.*
49. *Who may enter.*
53. *Grantees of Reversions.*
57. *Effect of an Entry for a Condition broken.*
59. *Does not defeat Copyhold Grants.*
61. *Apportionment of Conditions.*
63. *How a Condition may be destroyed.*
69. *Distinction between a Condition and a Limitation.*

SECTION 1.

How to be performed, 1 Inst. 219 *b.*

WITH respect to the performance of a condition Lord Coke says, a diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate. For a condition that is to create an estate is to be performed by construction of law, as near it as may be, and according to its intent and meaning, albeit the letter and words of the condition cannot be performed. But otherwise it is of a condition that destroys an estate; for that is to be taken strictly; unless it be in certain special cases.

2. Where a literal performance of a condition becomes impossible, by the happening of some future

event, it must then be performed as near the intent as possible.

3. Thus Littleton says, if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and his wife, to hold to them and to the heirs of their two bodies engendered, and for default of such issue, the remainder to the right heirs of the feoffor. In this case, if the husband dies, living the wife, before any estate tail made unto them, then ought the feoffee to make an estate to the wife, as near to the intent of the condition as may be; that is, to limit the land to the wife for life, without impeachment of waste, remainder to the heirs of the body of her husband, on her begotten; remainder to the right heirs of the husband. § 352.

4. Where there is a condition precedent copulative, the whole must be performed before the estate can arise.

5. Sir H. Wood, reciting the intended marriage of his daughter with the Duke of Southampton, limited his estate to the use of himself for life, remainder to the use of trustees and their heirs, to the intent that in case the Duke of Southampton should be married to his daughter, after the age of sixteen, and they should have issue male, then the trustees and their heirs should stand seised of the premises in trust for the duke, during his life. The marriage took place before the lady was sixteen, but she lived to that age, and died without issue. The question was, whether the duke was entitled to an estate for life.—It was decreed that the duke was entitled to an estate for life under the settlement; but this decree was reversed in the House of Lords, and Lord Chief Baron Comyns says, the reversal was founded on this, that the words were plain and certain, that there must

Wood v. Southampton, 2 Freem. 186. Show. Parl. Ca. 83.

Com. R. 732.

not only be a marriage, but also issue male. And when a condition copulative, consisting of several branches, is made precedent to any use or trust, the entire condition must be performed; else the use or trust can never arise or take place. And it would be violence to break the condition into two parts, which was but one, according to the plain and natural sense of it.

Who may perform it.

1 Inst. 207 *b.*

6. With respect to the person who may perform a condition, it is a general rule that every one who has an interest in the condition, or in the land to which it relates, may perform it. As if a feoffee, upon condition to pay at Michaelmas 20*l.*, enfeoffs another person before that time, the second feoffee may perform the condition.

Lit. § 234.

7. Where a time is appointed for the performance of a condition, the right to perform it will descend to the heir. Thus if a feoffment be made upon condition to be void, if the feoffor pays a certain sum of money on a particular day, though the feoffor should die before the day of payment, yet his heir may perform the condition.

Marks v. Marks, 1 Ab. Eq. 106.

8. A person having two sons, B. and C., devised lands to his wife for life, after her death to his son C. and his heirs: provided that if B. did, within three months after the death of his wife, pay to C., his executors or administrators, the sum of 500*l.* then the said lands should go to B. and his heirs. The wife lived several years, and during her life B. died, leaving J. D. his heir; who not being heir at law to the testator, the question was, whether he could, after the death of the wife, perform the condition. And though it was objected that this being a condition precedent, and merely personal in B., who had neither *jus in re* nor *ad rem*, and could not

therefore release or extinguish the condition, consequently that his heir could not perform it after his death; yet it was held, and so decreed, that the possibility of performing this condition was an interest or right, or *scintilla juris*, which vested in B. himself, and descended to his heir, who might perform it.

9. But where the words of a condition are general, and no time is specified for the performance of it, such a condition must be performed by the party to whom it is reserved, and not by his heir.

10. Thus Littleton, § 337, says, where a feoffment is made upon condition, that if the feoffor pays a certain sum of money to the feoffee, then it shall be lawful for the feoffor and his heirs to enter. In this case, if the feoffor dies before the payment is made, his heir cannot perform the condition.

11. Where a particular time is appointed for the performance of a condition, it must be performed at or before that time. But where no particular time is appointed, the person to whom the condition is reserved, must, in some cases, perform it within a reasonable and convenient time; and in other cases he may perform it at any time during his life. But if he dies without performing it, the right is not transmitted to his heir. At what Time. Lit. § 337.

12. Thus if a feoffment be made upon condition, that if the feoffee does not pay, &c. it shall be lawful for the feoffor to re-enter; the money ought to be paid to the feoffor in convenient time, for it is not reasonable that the feoffee shall have the benefit of the land, and not pay the money. But if the condition be, that if the feoffor pays, &c. he may re-enter; the feoffor has time to pay it during his life, because the other has the profit of the land, and has no loss by the nonpayment. 2 And. 73.

At what Place. 1 Roll. Ab. 444.

13. Where a particular place is appointed for the performance of a condition, the party who is to perform it must come to that place; for the person to whom the condition is to be performed is not obliged to accept of the performance elsewhere: he may however, if he pleases, accept of the performance at another place, and such acceptance will be good.

Lit. § 340. 1 Inst. 210 *b.*

14. If no particular place be appointed for the performance of a condition, and the condition be, that the feoffee shall pay a sum of money: in that case the feoffee must seek for the person to whom the money is to be paid, if he be within the realm: if he is out of the realm, then it is not incumbent on the feoffee to seek him, nor is the condition broken.

Id. 2 Leon. 260.

15. Where the condition is, to deliver twenty quarters of wheat, or twenty loads of timber, or such like, the feoffor is not bound to carry the same about, and seek the feoffee; but the feoffor must, before the day, go to the feoffee, and learn where he will appoint to receive it, and there it must be delivered.

Who are bound to perform it.

16. Where an estate is given upon condition, the taking possession of the land to which the condition is annexed, binds to the performance of the condition, even though such performance should be attended with a loss.

Att. Gen. *v.* Christ's Hospital, 3 Bro. Cha. R. 165.

17. An estate being devised to Christ's Hospital, on condition of maintaining six children from a particular parish: the hospital having taken possession of the estate, the rents at first proved insufficient to maintain six children, so that the hospital had only maintained three; and an account having been exhibited to the governors, the latter had been satisfied. But, upon filing the information, it was found that there had been a mistake in the account, the rents not having been expended, and it appeared that

they had become sufficient to maintain the whole number.

Lord Thurlow said, that whether the rents were or were not sufficient to maintain the number, the hospital, having taken possession of the estate, was bound to perform the condition; and that they should have considered of that, previous to taking possession. Att. Gen. v. Andrew, 3 Ves. 633.

19. If an estate be made to a married woman upon condition, she will be bound to perform it, because this does not charge her person, but the land. So if an estate be made to an infant, upon an express condition, the infant will be bound to perform it. And if an estate be made to a person in fee upon condition, his heir, in case of his death, though he be within age, shall be bound by the condition. 1 Roll. Ab. 421.

19. When a condition is performed, it is thenceforth entirely gone; and the thing to which it was annexed becomes absolute and unconditional. Effect of the Performance of a Condition.

We have seen that this was the principle adopted by the judges, in the construction of a gift to a man and the heirs of his body. But the statute *de donis* took away that construction, and declared that this kind of estate should descend to the heirs of the body only of the grantee; and that there remained a reversion in the grantor; not a right of entry for a condition broken. Tit. 2. c. 1.

20. There are several circumstances which will excuse the non-performance of a condition. Thus, where the performance of it becomes impossible by the act of God, it is excused. What excuses the Non-performance of a Condition. 1 Inst. 206*a*. 2 Atk. 18.

21. A person devised his estate to his eldest daughter, upon condition she would marry his nephew, on or before she attained the age of 21 years. The nephew died young, and the daughter never refused, nor was ever required to marry him. Adjudged that Thomas v. Howell, 1 Salk. 170.

the condition was not broken, having become impossible by the act of God.

1 Inst. 206 *a*. 218 *a*.

22. Where the performance of a condition becomes impossible by the act of God; if it is precedent, no estate will vest; but if it be subsequent, the estate becomes absolute.

23. Where the performance of a condition becomes impossible by the act of the person who created it, the estate becomes absolute.

Darley v. Langworthy, 3 Bro. Parl. Ca. 359.

24. Vincent Darley devised his estate, called Battins, to his sister, for her life. He also gave her the rents and profits of all his chattel estates for so many years as she should live, and she should choose to reside at Battins.

The testator afterwards revoked the devise of the estate of Battins, and it was resolved that the devisee was entitled to the benefit of the chattel estates, discharged from the condition of living at Battins; which the revocation had put out of her power.

Wigley v. Blackwall, Cro. Eliz. 780.

25. If a condition consists of two parts, of which one was impossible to be performed at the time when it was created, yet the other must be performed, and the performance of the part which is possible will be sufficient.

Laughter's Case, 5 Rep. 21.

26. But where a condition consists of two parts in the disjunctive, and the party has an election which of them to perform, and both are possible at the time of creating the condition, but one of them becomes after impossible by the act of God; this will excuse the performance of that, and also of the other; for otherwise the election would be taken away by the act of God.

1 Ld. Raym. 279. Da Costa v. Davis.

27. In a subsequent case it was said by the Court of Common Pleas—"That the rule and reason in Laughter's case ought not to be taken so largely as

Lord Coke has reported, but according to the nature of the case." 1 Bos. & Pul. 242.

28. A condition may also be excused by the default of the person to whom it is to be performed, viz. by tender and refusal. It is also excused, 1. by his absence in those cases where his presence is necessary, for the performance of it; 2. by his obstructing or preventing the performance of it; 3. by his neglecting to do the first act, if it be incumbent on him to do it. 1 Roll. Ab. 453.

29. Thus if a man be bound to build a house, &c. he will be excused, if the person to whom he is bound prevents him from building it, either by any act of his own, or by any act of a stranger, by his command. Bro. Ab. Tit. Coven. pl. 31.

30. The condition of a bond was, that A. and his wife should, in Easter term next after the date of the bond, levy a fine to B. Lord Hobart said, that in this case B. was bound to sue out a writ of covenant, otherwise the condition was not broken. Walrond v. Hill, Hut. 48.

31. In an action for debt for 500 *l.*, the penalty for articles of agreement. The declaration stated the agreement to have been, that, Shore, the defendant, was to purchase of the Duke of St. Albans (the plaintiff) a farm, at the price of 2,594 *l.*, which was to be paid at Lady-day then next, in the following manner:—The Duke was to accept of a conveyance of certain estates of Shore, at the price of 1,840 *l.*, which he was to convey at the expence of the duke, and the duke to make a good title to Shore at Shore's expence, who, on executing the conveyances, was to receive the rest of the purchase money: all timber, trees, elms, and willows, which then were upon any of the estates, to be valued, and the prices thereof to be paid by the respective purchasers. It was also agreed, that in case the duke should not be enabled St. Albans v. Shore, 1 Hen. Black. 270.

to make a good title to the estate before the 24th of March, the agreement should be void.

The defendant, Shore, pleaded that the duke was not capable, ready, and willing to make a good title to the said farm; and farther, that the said duke had cut down divers trees on the said farm, which by the agreement were to be valued, whereby the duke disabled himself from performing his agreement; for which reason the defendant declined and refused to carry the articles into execution. Replication; issue on the first plea, and general demurrer on the second. Lord Loughborough said it was clear, that unless the plaintiff had done all that was incumbent on him to do, in order to create a performance by the defendant (if he might use the expression), he was not entitled to maintain the action. If he had not set forth a sufficient title, judgement must be against him, whatever the plea was; and if the plea was a good bar, the same consequence would follow. That it was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent; and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of Boone v. Eyre was cited; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well-founded distinction, that where a covenant went to the whole of the consideration, on both sides, there it was a condition precedent; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy; for this plain reason, because the damages might be unequal. Then the question was, whether the covenant of the plaintiff went to the whole consideration of that which was to be done by

1 H. Black. R. 273. *n.*

the defendant. The duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included: the timber was not disjoined from the estate by a separate valuation; it was expressly agreed that all trees, &c. which then were upon any of the estates should be valued, but it was not to be permitted to a party contracting to convey land, which included the timber, by his own act, to alter the nature of it, between the time of entering into the contract, and that of performing it. There might be cases where the timber growing on an estate was the chief inducement to a purchase of that estate: but it was not necessary to inquire whether it was the chief inducement to a purchase or not; for if it might be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate, by cutting down any of it. This was not an action of covenant where one party had performed his part, but was brought for a penalty, on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to complete his part. The court was therefore of opinion that the plea was a good bar to the action: and on this gave judgement for the defendant. Hard v. Wadham, 1 East. 619.

82. The Court of Chancery has in many cases interposed to moderate the rigour of the common law, in respect to the breach of conditions; upon the principle that equity ought to relieve against all forfeitures and penalties, wherever a compensation can be made. It was however formerly held that a court of equity could not relieve against a condition precedent; but that, in the case of a condition subsequent, it was otherwise. It is however now settled, Equity relieves against Conditions.

that the substantial difference which governs the interference of courts of equity in cases of conditions, is not whether the condition be precedent or subsequent, but whether a compensation can or cannot be made.

Hayward v. Angel, 1 Vern. 222.

Cage v. Russell, 2 Vent. 352.

33. A married woman having a power to dispose of lands, devised them to her executors, to pay 500*l.* out of them to her son; provided that if the father gave not a sufficient release of certain goods to her executors, then the devise of the 500*l.* should be void, and it should go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to execute. On a bill brought by the son against the executors and the father, the father answered, that he was then ready to release, though for some reasons he had before refused; whereupon the court decreed the payment of the 500*l.*, and said it was the standing rule that a forfeiture should not bind, where a thing might be done after; or a compensation made for it.

Grimstone v. Bruce, 1 Salk. 156.

34. A person devised lands to J. B. upon condition to pay 20,000*l.* to his heir at law, viz. 1,000*l.* per annum for the first sixteen years, and 2,000*l.* per annum after, till the whole should be paid. The heir entered for the nonpayment of one of the sums of 1,000*l.* Decreed that J. B. should be relieved upon payment of the 1,000*l.* with interest: the court declaring, that wherever it could give satisfaction or compensation for the breach of a condition, it would relieve.

Woodman v. Blake, 2 Vern. 222.

35. A person having three daughters, devised lands to his eldest daughter, upon condition that she would, within six months after the testator's death, pay certain sums to her two sisters; if she failed, then he devised the lands to his second daughter, on the like condition. The court said, it would enlarge the time

of payment, though the lands were devised over; and that in all cases which lay in compensation, the court might dispense with the time, even in the case of a condition precedent.

36. A person devised lands to his kinsman J. S., paying 1,000*l.* a-piece to his two daughters, who were his heirs at law. J. S. made default, and the daughters recovered the lands in ejectment. It was decreed that the heir of J. S. should be relieved, on payment of the principal and interest, though in favour of a volunteer, and to the disherison of the heir. Barnardiston v. Fane, 2 Vern. 366.

37. Where there can be no compensation in damages, a court of equity will not relieve. Where Equity will not relieve,

38. A person made a lease, with a condition of reentry if the lessee aliened, or assigned it without licence; the lessee did assign it without licence: the court said this was a forfeiture, against which it could not relieve, because it was unknown what should be the measure of the damages; for the court never relieved, but in those cases where it could give some compensation, and where there was some rule to be the measure of such damages, to avoid being arbitrary. Wafer v. Mocato, 9 Mod. 112.

39. Where there is no ground for the interference of a court of equity to relieve against a condition, and an estate is limited, defeasible upon the breach of a condition, the Court of Chancery will decree a reconveyance.

40. A proviso was inserted in a marriage settlement, that if the intended marriage took effect, and the intended wife should not, when she came of age, by fine or otherwise, join in charging an estate to which she was entitled with 2,000*l.* then the settlement was to be void. The marriage took effect; but the wife finding, when she came of age, that her own Hunt. v. Hunt, Gilb. R. 43. Prec. in Cha. 387.

estate was of greater value than the jointure, she and her husband refused to join in charging it with 2,000*l.* Whereupon a bill was brought to have a reconveyance, which was decreed; and an account of the rents and profits directed from the time of the refusal; but no costs on either side; for this was not a condition precedent, but subsequent to the vesting of the estates in the defendant.

Of an Entry for a Condition broken.

41. Upon breach of a condition, the feoffor or grantor, or his heir, becomes entitled to the estate to which such condition was annexed: in the case of freeholds, the only mode by which advantage can be taken of the breach of a condition is, by entry; or if that should be impossible, then by claim: because the solemnity of a feoffment, with livery of seisin, can only be defeated by an act of equal notoriety.

1 Inst. 218 *a*.

Fitchet v. Adams, 2 Stra. 1128.

42. An entry by a stranger, on behalf of the person entitled to enter, is good without any authority; provided it be assented to afterwards by the person entitled.

1 Inst. 218 *a*.

43. In the case of advowsons, rents, commons, remainders and reversions, where no entry can be made, there must be a claim; which must be made at the church, or upon the land.

Poph. 53.

44. In all cases where the crown is entitled to land upon the breach of a condition, an office countervails an entry.

§ 350.

45. Littleton has stated the following case, in which no entry is necessary:—Where land is granted to a man for term of five years, with a condition, that if he pays the grantor within the two first years forty marks, that then he shall have the fee, or otherwise but for five years; and livery of seisin is made by force of the grant. Now the grantee has a fee simple conditional, and if he does not pay the forty marks

within the time, then the fee and the freehold shall be adjudged to be in the grantor, without entry or claim, because the grantor cannot immediately enter, for the grantee is still entitled to hold the lands for three years. And Lord Coke observes on this case, that "seeing by construction of law the freehold and inheritance passeth *maintenant* out of the lessor; by the like construction the freehold and inheritance, by the default of the lessee, shall be revested in the lessor without entry or claim." 1 Inst. 218 *a.*

46. Lord Coke has also stated two cases where no entry is necessary: 1. If a person grants a rent-charge out of his lands, upon condition; there, if the condition is broken, the rent will be extinct, because the grantor being in possession, need not make a claim upon his own land; therefore the law will adjudge the rent void, without any claim. 2. If a man makes a feoffment in fee, upon condition that the feoffee shall pay 20 *l.* on a particular day, and before the day the feoffee lets the land to the feoffor for years, reserving rent; and afterwards fails of payment, the feoffor shall retain the land, for he could not enter, being himself in possession. Idem.

47. There is however a distinction between a condition that requires an entry, and a limitation that determines the estate *ipso facto* without an entry; of which an account will be given hereafter. Infra, § 70.

48. Where an estate for years determines by a condition, no entry is necessary. Thus if a person demises lands for years, upon condition that if the lessor pays to the lessee 10 *l.*, his estate shall cease. There if the lessor performs the condition, the estate of the lessee is immediately determined without any entry. Plowd. 142. Bro. Ab. Cond. 83. Vide Tit. 8. c. 1. § 24.

49. It has been stated that the benefit of a condition can only be reserved to the feoffor, donor, or Who may enter. Lit. § 347.

lessor, and their heirs. It is a rule of the common law that no one can take advantage of the breach of a condition expressed, but parties and privies in right and representation, as heirs, executors or administrators of natural persons, and the successors of bodies politic.

Lit. § 348. So that neither privies nor assignees in law, as lords by escheat; nor privies in estate, as persons in remainder or reversion, could formerly enter for a condition broken.

50. It should however be observed, that in the case of conditions implied, or in law, privies and assignees in law may enter for a condition broken.

1 Inst. 215 *a*. Thus Lord Coke says, if a man makes a lease for life, there is a condition in law annexed to it, that if the lessee creates a greater estate, &c. then the lessor may enter. Of this and the like conditions in law, which give an entry to the lessor, not only the lessor himself and his heirs may take the benefit, but also his assignee, and the lord by escheat.

1 And. 184. 2—22. 51. None but the heir at common law can enter for a condition broken. Thus if a person seised of lands in right of his mother, makes a feoffment in fee of them upon condition, and dies, and afterwards the condition is broken, the heir on the part of the father shall enter; for though the estate does not descend to him, yet the right of entry for the condition broken, which was created by the feoffment, and reserved to the feoffor and his heirs, descended on him. But when he has entered, the heir on the part of the mother may enter upon him.

Rob. Gav. 119. Godb. 3. 52. If a condition be annexed to an estate held in gavelkind, and is broken, the heir at common law must enter for the breach; but after such entry, all the younger sons shall enjoy the estate with him.

Grantees of Reversions.

53. Upon the dissolution of the monasteries by King Henry VIII. most of their estates were granted to private persons, who could not take advantage of the conditions contained in the leases which had been formerly made of them. This produced the statute 32 Hen. VIII. c. 34. reciting that divers persons had leased manors, &c. for life or lives, or years, by writing, containing certain conditions, covenants, and agreements; and reciting that, by the common law, no stranger to any condition or covenant could take advantage thereof, &c. It is enacted, "That all persons and bodies politic, their heirs, successors and assigns, which have, or shall have, any gift or grant of the king, of any lordships, manors, lands, &c. which did belong or appertain to any of the monasteries, &c. or which belonged to any other persons, &c. and also all other persons, being grantees or assignees to the king, or to any other person or persons, and the heirs, executors, successors, and assigns of every of them, shall and may have the like advantage by entry for non-payment of rent, for doing waste, or other forfeiture; and the same remedy, by action only, for not performing other conditions, covenants, and agreements contained in the said leases, against the lessees and grantees, their executors, administrators, and assigns, as the lessors and granters ought, should, or might have had at any time or times."

1 Inst. 215 *a*.

54. Lord Coke states the following resolutions and judgements made upon this statute. 1. The statute is general, viz. that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions. 2. It extends to grants made by the successors of the king, though the king be only named in the act. 3. Where the statute speaks of lessees, the same does not extend to gifts in tail.

Hill v. Grange, Plowd. 167.

4. Where the statute speaks of grantees and assignees of the reversion, an assignee of part of the estate of the reversion may take advantage of the condition. 5. A grantee of part of the reversion shall not take advantage of the condition. 6. Where the lessor bargains and sells the reversion by deed indented and enrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute. So if the lessor grant the reversion in fee, to the use of A. and his heirs, A. is a sufficient assignee within the statute, because he comes in by the act and limitation of the party; albeit he is in the *post*, and the words of the statute are, "to or by"—and they are assignees to him, though they be not by him. But such as come in merely by act of law, as the lord by escheat, or the like, shall not take benefit by this statute. 7. Although the words of the statute are, for non-payment of rent, or for doing waste, or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent; or for the benefit of the estate, as for not doing waste, for keeping the houses in repair, or such like: and not for the payment of any sum in gross, or things of that nature.

Effect of an Entry for a Condition broken. Lit. § 325. 1 Inst. 202 *a*.

55. Where a person enters for a condition broken, the estate becomes void *ab initio*; the person who enters is again seised of his original estate, in the same manner as if he had never conveyed it away. And as the entry of the feoffor on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate; together with all charges and incumbrances created by the feoffee dur-

ing his possession: for, upon the entry of the feoffor he becomes seised of an estate paramount to that which was subject to those charges.

56. Thus if a person having an estate on condition grants a rent-charge out of the land, or acknowledges a statute or judgement, and afterwards the condition is broken, for the breach of which the feoffor enters; he shall avoid all those incumbrances. 1 Rep. 147 *b.*

57. So if a man seised of a conditional estate marries, after which the condition is broken, and the grantor enters for the breach, he will avoid the wife's title to dower. 1 Roll. Ab. 474.

58. Although in general a person who enters for a condition broken becomes seised of his old estate, yet Lord Coke mentions some cases where this cannot be, on account of the alterations which have happened in the mean time. 1 Inst. 202 *a.*

59. An entry for a condition broken does not defeat copyhold grants: therefore if a person makes a feoffment in fee of a manor, upon condition; and the feoffee grants estates by copy, afterwards the condition is broken, and the feoffor enters for the breach; yet the grants by copy made by the feoffee, even after the breach of the condition, shall stand good; for the feoffee was *legitimus dominus pro tempore*. Besides the copyholder does not claim his estate from the lord's grant, but from the custom. Does not defeat Copyhold Grants. Co. Cop. § 34. 4 Rep. 24 *a.* Gilb. Ten. 200. Tit. 10. c. 2.

60. If however a lease be made of a manor for years only, upon condition, and the condition is broken; no copyhold grants made after the breach of the condition will bind the lessor: because the estate of the lessee became absolutely void, by the breach of the condition without entry. Gilb. Ten. 201.

61. A condition being entire cannot in general be apportioned by the act of the parties: therefore a Apportionment of Conditions.

1 Inst. 215 *a.* grantee of a part of the reversion shall not take advantage of a condition. As if a lease be made of three acres of land, reserving a rent, upon condition; and the reversion of two acres of the land is granted away. The rent shall be apportioned by the act of the parties; but the condition is destroyed; for that is entire, and against common right.

Idem. 62. There are however two cases in which Lord Coke says a condition may be apportioned: 1. By act in law, as if a person seised of two acres, the one in fee, the other in burrough english, has issue two sons, and leases both acres for life or years, upon condition, the lessor dies; in this case, by the descent, which is an act in law, the reversion and condition are divided. 2. By act and wrong of the lessee, as if a lessee makes a feoffment of part of the lands, and the lessor enters for the forfeiture; there the condition shall be apportioned; for no one shall take advantage of his own wrong.

How a Condition may be destroyed. 63. A condition may be destroyed in several ways. Thus it has been stated, that where a condition cannot be apportioned, it is destroyed.

ante, § 61.

64. A condition may be destroyed by a release. Thus Lord Coke says, if feoffee upon condition make a lease for life, or a gift in tail, and the feoffor release the condition to the feoffee, he shall not enter on the lessee or donee, because he cannot regain his antient estate.

1 Inst. 291 *b.* 297 *b.*

Idem. 65. If the feoffee upon condition make a lease for life, the remainder in fee, and the feoffor release the condition to the lessee for life, it shall enure to him in remainder.

Vide Tit. 32. c. 5. 66. Acceptance of rent after the breach of a condition will in many cases operate as a discharge of the condition.

67. Lord Coke mentions a distinction between a condition that defeats an estate, but requires a re-entry; and a limitation which determines the estate *ipso facto*, without entry. Of the first sort it has been shewn that a stranger cannot take advantage; but of limitations it is otherwise: as if a man makes a lease *quousque*, that is, until J. S. returns from Rome; the lessor grants over the reversion to a stranger; J. S. returns from Rome: the grantee of the reversion may take advantage of the return of J. S. and enter, because the estate was determined by an express limitation. Distinction between a Condition and a Limitation. 1 Inst. 214 *b.*

68. It is the same where a man makes a lease to a woman *quamdiu casta vixerit*: or where a man makes a lease for life to a widow, *si tamdiu in pura viduitate vixerit*: So if a man makes a lease for a hundred years, if the lessee lives so long, the lessor grants over the reversion, and the lessee dies, the grantee of the reversion may enter. Idem.

69. There are also several cases of wills, in which the estate is devised over on breach of the condition, which will be stated in a subsequent title. These however are not properly estates on condition, but conditional limitations. Tit. 16. c. 2.

TITLE XIV.

Estates by Statute Merchant, Statute Staple, and Elegit.

1. *Estates held as a Security for Money.*
2. *Land not originally subject to Debts.*
6. *Statute of Acton Burnell.*
7. *Statute Merchant.*
10. *Statute Staple.*
13. *Recognizance.*
16. *Judgement and Elegit.*
22. *When Judgements bind Lands.*
26. *Judgements must be docketed.*
32. *Statutes, Judgements, and Recognizances must, in some Places, be registered.*
36. *Execution upon a Statute or Recognizance.*
44. *Proceedings on an Elegit.*
52. *Priority of the Crown in Executions.*
60. *What may be extended.*
65. *Terms for Years.*
71. *Trust Estates.*
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80. *These Estates are only Chattels.*
83. *Must be executed by Entry.*
89. *Remedies upon Eviction.*
105. *How long they may endure.*
108. *How they are determined.*
118. *The Crown may sell under an Extent.*
120. *A Statute, &c. protects Purchasers.*

Section 1.

Estates held as a Security for Money.

I SHALL now proceed to explain the nature of those estates which are held as a security or pledge for the repayment of money; of which there are two kinds: one where the creditor acquires the estate by some legal and compulsory process; and the other where the estate is conveyed by the debtor to the creditor, as a pledge for securing the repayment of the money borrowed. The first kind are called estates by statute merchant, statute staple, and elegit, and owe their rise to the following circumstances.

2. Upon the introduction of the feudal law into England, the feudatory was not only prohibited from alienating his land, but also from charging it with the payment of his debts; because this might tend to disable him from performing his military service. The goods and chattels therefore of the debtor, and the annual profits of his lands, as they arose, were the only funds which the law allotted for the payment of his debts. And this was thought the more reasonable, because nothing more than a chattel being borrowed, the chattels only of the debtor ought to be liable to the debt.

Land not originally subject to Debts. Wright's Ten. 169.

3. Although this law was well suited to the situation of a warlike nation, who cultivated their own lands, and lived on the produce; yet it was no ways calculated for a trading people, where it is a material object to create an extensive credit; which can only be done by making every kind of property subject to the payment of debts. Therefore when, about the reign of Henry III., the English began to acquire some little foreign trade, the inconveniencies of this doctrine began to be felt.

4. The king's prerogative indeed formed an exception to this rule; for he might always have had execution of the real estate, goods and chattels of his debtor: but still under this restriction inserted in *Magna Charta*, c. 8. that the lands of the debtor should not be extended, where the chattels were sufficient, and the debtor ready to answer the debt.

Tit. 1. § 63.

5. In the case of a private person, lands were also liable to execution in an action of debt against the heir, upon an obligation made by his ancestor; although in such a case the creditor could not have had execution against the ancestor himself. The reason given for this by Lord Coke is, that as the

3 Rep. 12 *a*.

common law had provided an action of debt against the heir; if the creditor could not have execution of the land, the action would have been useless; for the goods and chattels of the ancestor belonged to his executors.

Statute of Acton Burnell.

6. Thus stood the common law till the reign of Edward I., when great complaints having been made by foreign merchants respecting the difficulty of recovering their debts, which had occasioned several of them to withdraw themselves from the kingdom; the statute of Acton Burnell, *De Mercatoribus*, was made in the eleventh year of that prince; by which it was enacted, that the chattels and devisable burgages of the debtor might be sold for the payment of his debts.

Statute Merchant.

7. In consequence of several complaints that the sheriffs misinterpreted this statute, and delayed the execution of it, King Edward, in the parliament held at Westminster two years after, caused it to be rehearsed before him; and as a farther security to merchants, a new statute was made, by which it was enacted that every merchant, to whom money was due, should cause his debtor to come before the mayor of London, or some chief warden of a city, and one of the clerks that the king should thereto assign, who should acknowledge the debt, and the day of payment; that this acknowledgement should be enrolled by one of the clerks; the roll to be double, whereof one part should remain with the mayor, the other with the clerk; that one of the said clerks should write an obligation, to which the seal of the debtor should be put, together with the king's seal. If the debtor did not pay at the day limited, all his lands should be delivered to the merchant, to hold to him until such time as the debt was wholly levied; and the merchant should have such seisin in the lands and tene-

13 Edw. I. stat. 3. c. 1.

ments delivered to him or his assigns, that he might maintain a writ of novel disseisin, if he was ousted.

8. This species of security is called a statute merchant; it may be described to be a bond or contract upon record, publicly acknowledged before the proper officer, and attested by the king's seal. 2 Saund. R. 69. c. n.

9. The addition of the king's seal, which was never required to any contract at common law, was made in order to authenticate, and render the security of a higher nature than any other then known. For by this the king, in the person of the mayor, attests the contract, and takes immediate cognizance of the debt. Consequently execution is to be awarded, upon failure of payment on the day assigned, without any mesne process to summon the debtor; or the trouble or charge of bringing proofs to convict him. For judges require these, on common contracts, to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant. But to this contract the king himself is a witness; there is besides the acknowledgement and confession of the debtor, that he really owes so much; which is the best and strongest evidence of the fact; therefore immediate execution is granted.

10. Another species of security of a similar nature in many respects to a statute merchant is a statute staple: to explain which it will be necessary to premise, that in the reign of Edw. III. it was thought expedient to pass the statute of the staple 27 Edw. III. stat. 2., which confined the sale of all English commodities, that were to be exported, to certain towns in England, called the *estaple* or *staple*, where foreigners might resort to purchase; and to declare that no Englishman should, under great penalties, export these commodities himself. Statute Staple.

11. This statute directs a proceeding similar to that which was prescribed for obtaining a statute merchant. The mayor of the place is empowered to take recognizances of debts, which any one makes before him, in the presence of the constables of the staple; for which purpose, in every staple, a seal was to be kept by the mayor, with which all obligations made upon such recognizances, were to be sealed; and in consequence of this sealed obligation, execution might be obtained against the lands and tenements of the debtor, in the same manner as under a statute merchant: so that the creditor should have a permanent interest in the lands and tenements thus delivered to him; with a right, if ousted, to recover them by a writ of novel disseisin.

12. A statute staple is therefore a bond of record, acknowledged before the mayor of some trading town, and attested by a public seal. But although both the statute merchant and statute staple were originally intended for the benefit of merchants only, yet, as they were obtained without any great trouble or expence, they became generally adopted as a common mode of security.

Recognizance, 2 Saund. R. 70. *n.*

13. The practice of obtaining statutes staple of persons not concerned in trade became so universal, that an act was made in 23 Hen. VIII. c. 6. prohibiting any persons but merchants from taking them. But this act created a new kind of security, called a recognizance in the nature of a statute staple, which is a bond acknowledged before the justices of the King's Bench or Common Pleas, the mayor of the staple at Westminster, or the recorder of London, and enrolled: upon which the same advantages may be had as upon a statute staple.

14. By the statute 8 Geo. I. c. 25. it is enacted, that the clerk of recognizances shall keep three parch-

ment rolls, and shall, at the time of acknowledging every recognizance, engross the full tenor thereof *in hæc verba*; that one of the said rolls shall contain the recognizances taken before the chief justice of King's Bench; another, those taken before the chief justice of Common Pleas; and the other, those taken before the mayor of the staple at Westminster, and recorder of London: that at the time of every such acknowledgement, the respective persons before whom such recognizances shall be taken, and also the parties acknowledging the same, shall sign their respective names to the roll, as well as sign and seal the same recognizance: any loss happening to such recognizance to be certified into chancery; and a transcript of the entry to be annexed to such certificate; and in case of loss, a copy to be good evidence.

15. By the eighteenth section of the statute of frauds, 29 Cha. II. c. 3., it is enacted, that the day of the month and the year of the enrolment of recognizances shall be set down in the margent of the roll, where the said recognizances are enrolled; and that no recognizance shall bind any lands, &c. in the hands of any purchaser *bonâ fide*, and for valuable consideration, but from the time of such enrolment.

16. By the common law, in all actions where judgement for money alone was obtained, satisfaction could only be had of the goods and chattels of the defendant, and the growing profits of his lands, but not the possession of them. This was a natural consequence of the feudal principles, which prohibited the alienation, and of course the incumbering a feud with debts. When the restrictions on alienation were taken away, this consequence still continued: no creditor could take possession of his debtor's land, but

Judgement and *Elegit*.

Harbert's Case, 3 Rep. 11.

only levy the growing profits; and if the debtor aliened the land, the creditor lost even that.

2 Inst. 394. 2 Saund. R. 68 *a. n.*

17. To remedy this, it was enacted by the statute Westm. 2. 13 Edw. I. c. 18., that when a debt was recovered, or acknowledged, or damages adjudged in the king's courts, the plaintiff should have his election, either to have a writ of *fieri facias*, or else that the sheriff should deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough; and also one half of his lands, until the debt was levied, upon a reasonable price or extent.

18. In pursuance of this statute, a new writ of execution was framed, called a writ of *elegit*, from the words of the writ: for where a plaintiff prayed this writ, the entry on the roll was—*Quod elegit sibi executionem fieri de omnibus catallis, et medietatem terræ.* And thus a judgement in an action of debt, obtained in any of the courts of record at Westminster, becomes a lien on freehold estates, as it enables the person for whom such judgement is given, to obtain one half of the debtor's lands and tenements.

Tit. 15. c. 5.

19. A judgement will therefore take place of a mortgage, if it is prior to it; though it is said that a judgement creditor has neither *jus in re*, nor *ad rem*; therefore if he releases all his right to the land, yet he may extend it afterwards.

2 P. Wms. 491.

20. The statute says, *cum debitum fuerit recuperatum, vel in curia regis recognitum.* These last words gave rise to a practice which is now become general: when money is borrowed, the debtor not only executes a bond to the creditor, but also a warrant of attorney, addressed to one or more attornies of some court at Westminster, authorizing him or them to acknowledge a judgement for the money; which enables the

creditor to sue out a writ of *elegit* as effectually as if the judgement had been obtained in an adversary suit.

21. In a modern case, Lord Kenyon said he saw no difference between a judgement that was obtained in consequence of an action resisted, and a judgement that was signed under a warrant of attorney; since the latter was merely to shorten the process, and to lessen the expence of the proceedings. Doe v. Carter, Tit. 13. c. 1. § 46.

22. The term, in law, is considered to many purposes as but one day: therefore if a judgement be given, or acknowledged, at any time during a term, it relates to the first day of that term, and is considered in law as having been given on that day: the first day of term is the essoign day; for the *quarto die post* is only a day of grace. When Judgements bind Lands. Hodges v. Templar, 6 Mod. 191.

23. In consequence of this doctrine, purchasers were frequently affected by judgements obtained after their conveyances had been executed. To remedy this, it was enacted by the fourteenth section of the statute of frauds, "That any judge or officer of any of His Majesty's courts of Westminster that shall sign any judgements, shall at the signing of the same, without fee, set down the day of the month and year of his so doing, upon the paper book, docket, or record, which he shall sign; which day of the month and year shall be also entered upon the margent of the roll of the record, where the said judgement shall be entered."

24. By the fifteenth section it is enacted, "That such judgements as against purchasers *bonâ fide*, for valuable consideration of lands, &c. to be charged thereby, shall, in consideration of law, be judgements only from such time as they shall be so signed; and shall not relate to the first day of the term whereof

they are entered, or the day of the return of the original, or filing the bail."

25. By the statute 8 Geo. I. c. 25. § 6., these regulations, as to the signing of judgements, are extended to judgements obtained in the courts of great session in Wales, and the courts of the counties palatine of Chester, Lancaster, and Durham.

Judgements must be docketed.

26. By the statute 4 & 5 Will. & Mary, c. 20., made perpetual by 7 & 8 Will. III. c. 36. § 3., it is enacted, That the clerk of the essoigns of the court of Common Pleas, the clerk of the dockets of the Court of King's Bench, and the master of the office of pleas in the Court of Exchequer, shall make and put into an alphabetical docket, by the defendants names, a particular of all judgements for debt, by confession, *non sum informatus*, or *nihil dicit*, entered in the said respective courts of Michaelmas and Hilary terms, before the last day of the ensuing terms; and of the judgements of Easter and Trinity terms, before the last day of Michaelmas term. And it is thereby further enacted, "That no judgement not docketed, and entered into the books as aforesaid, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates effects."

Forshall v. Coles, infra.

27. It is said by Sir J. Jekyll, that judgements cannot be docketed after the time mentioned in the act, viz. the last day of the subsequent term to that in which they are entered: that the practice of the clerks, docketing them after that time, was only an abuse, for the sake of their fees, and ineffectual to the party.

Hodges v. Templar, 6 Mod. 191.

28. Where a purchaser had notice of a judgement not docketed, and did not pay the full value of the

estate, the Court of Chancery held, that a presumption was thereby raised of an agreement, on the part of the purchaser, to pay off the judgement.

29. A bill was brought to have satisfaction of a judgement against a purchaser of an equity of redemption, or to redeem incumbrances, &c. The defendant insisted on the statute 4 & 5 Will. & Mary, that no judgement shall affect a purchaser or mortgagee, unless docketed: the judgement was not docketed till 1721, though the purchase was made in 1718. The counsel for the plaintiff insisted that the defendant, the purchaser, had notice of this judgement, and an allowance for it, in the purchase; which raised an equity for the plaintiff against him. Lord Macclesfield said, it was plain the defendant had notice of the judgement, and did not pay the value of the estate; that was a strong presumption of an agreement to pay off the judgement. And since the plaintiff could not proceed at law against the defendant, upon the judgement, for want of docketing in due time, he ought to be relieved in a court of equity. Decreed, that the defendant should pay to the plaintiff the money *bonâ fide* due upon the judgement. Thomas v. Pledwell, 7 Vin. Ab. 53.

30. In a subsequent case Sir Joseph Jekyll held, that notice of a judgement, which was not docketed, would not affect a purchaser; the statute being express that no judgement, not docketed, shall affect any lands or tenements. This doctrine is now altered; and it has been determined by Lord Eldon, that a purchaser is bound by notice of a judgement, though not docketed. Forshall v. Coles, 7 Vin. Ab. 5.

31. The bill stated that W. Davis, being seised in fee of lands, agreed to sell them to the defendant: that the abstract having been delivered, the defendant was satisfied with the title, except in respect of a Davis v. Strathmore, 16 Ves. 419.

judgement which was subsisting against Davis: th
the defendant contended that, having notice of t
judgement, the plaintiff's title was not such as a pu
chaser could safely take. The bill further state
that the judgement was not docketed, and therefo
was not, by law, any lien upon the estate; and th
the defendant's having notice of the judgement di
not afford any just reason why the estate should b
liable to it. Lord Eldon said, the opinion he ha
formed on this case, after much consideration, wa
that notice of the judgement would bind the pur-
Tit. 32. c. 28. chaser; by analogy to the case of the register acts.

Statutes, Judgements, and Recognizances must, in some Places, be registered.

32. By the statute 5 Ann. c. 18. § 4., no judge-
ment, statute, or recognizance, other than such as
are entered on account of the king, shall bind any
manors, lands, or hereditaments in the west riding of
the county of York, but only from the time that a me-
morial of such judgement, statute, or recognizance,
shall be entered at the register office of that riding.

33. By the statute 6 Ann. c. 35. § 19., no judge-
ment, statute, or recognizance, except as before, shall
bind any manors, &c. in the east riding of the county
of York, or in the town and county of the town of
Kingston upon Hull, but only from the time that a
memorial thereof shall be entered at the register office
§ 38. of that riding, with a proviso, that if any judgement,
statute, or recognizance be registered within thirty
days after the acknowledgement or signing thereof,
all the lands that the defendants or cognizors had at
the time of such acknowledgement or signing, shall
be bound thereby.

34. By the statute 7 Ann. c. 20. § 18., no judge-
ment, statute, or recognizance, except as before, shall
bind any manors, &c. in the county of Middlesex,
but only from the time that a memorial of such

judgement, statute, or recognizance, shall be entered at the register office for that county.

35. By the statute 8 Geo. II. c. 6. § 1. a memorial of all judgements, statutes, and recognizances, except as before, concerning any manors, &c. in the north riding of the county of York, may be registered; and every judgement, statute, or recognizance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, plaintiff or cognizee, for or upon valuable consideration, unless such memorial thereof be registered, before the registering of the memorial of the deed or conveyance, judgement, statute, or recognizance, under which such subsequent purchaser or mortgagee, plaintiff or cognizee, shall claim.

Provided that if any judgment, statute, or recognizance, be registered within twenty days after the acknowledgement or signing thereof, all the lands that the defendants or cognizees had at the time of such acknowledgement or signing, shall be bound thereby; and the registry of a memorial of such judgement, statute, or recognizance, within the time aforesaid, shall be available, to all intents and purposes, as if such memorial thereof had been entered in the said register office on the day of the signing or acknowledgement of such judgement, statute, or recognizance. § 33.

36. Where the money borrowed on the security of a statute merchant, statute staple, or recognizance, is not paid, the cognizee or creditor is entitled to a writ of execution, by which the lands of the debtor are delivered to him upon a reasonable extent; that is, upon a reasonable valuation, to be made by a jury, upon a writ of *extendi facias*, with this difference, that upon a statute merchant, the sheriff may deliver the

Execution upon a Statute or Recognizance.

19 Vin. Ab. 558.

lands to the cognizee immediately. But upon a statute staple or recognizance, the sheriff must first seize the lands into the king's hands, and then the cognizee must have a *liberate* to get them. So that, in this respect, a statute merchant is preferable to a statute staple or recognizance.

Winch. 83.

37. Even lands purchased after the acknowledgement of a statute or recognizance are bound by it; and execution may be had against the heir of the cognizor and the terretenants.

Harbert's Case, 3 Rep. 11.

Idem.

38. If the cognizee only takes part of the lands, it will be good; for he may dispense with the rigour of the law, if he pleases.

2 Roll. Ab. 472. pl. 3.

ee.

39. If the debtor sells all or any part of his lands, after he has acknowledged a statute or recognizance, still the cognizor may extend them, by the words of the statute; for otherwise it would be in the power of the cognizor, by his alienation, to frustrate the security.

3 Rep. 12 *b.*

40. Where the cognizor, after the acknowledgement of the statute, conveys his lands to several persons, the cognizee must then sue out execution of all the lands; for it would be unreasonable to load one of the purchasers only with the whole debt, when the burthen ought to be equally distributed on all: therefore the person grieved may relieve himself.

Dyer, 2 *b.* pl. 8.

41. An alien friend merchant may extend lands upon a statute; which the king shall not have upon office, and for which the merchant shall have an assise, in case of ouster; for the main end and design of the statute merchant, and statute staple, was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts.

42. By the stat. 8 Geo. I. c. 25. § 3. it is enacted, That the prosecutor of every recognizance shall, at

the time of suing out a writ of extent thereon, deliver in to the officer a note in writing, testifying the value of the damages intended to be extended or levied thereon.

43. By the 4th section of this statute, it is provided, that in case it shall be made appear to the Court of Chancery, that sufficient has not been levied to satisfy a recognizance, or that any omission, error, or mistake has happened in making, suing out, executing, or returning any writs or process thereon; then and in such case the Court of Chancery may award one or more re-extents for the satisfying the same.

44. When a writ of elegit is sued out, the sheriff is to impannel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same: also to inquire as to his lands and tenements; and upon such inquisition, to set out and deliver a moiety of the lands to the plaintiff, by metes and bounds. Proceedings on an Elegit, 10 Vin. Ab. 590.

45. If the sheriff delivers more than a moiety of the debtor's land, and this appears upon the return, the execution is totally void. For the sheriff has only a circumscribed authority, which he cannot exceed; so that what is extended beyond a moiety, being without authority, and there being no possibility of separating it from the rest, the whole is void, as if nothing had been extended. Carthew, in his report of this case, makes Lord Holt say, that the inquisition is not void, but voidable only by writ of error, or by an *audita querela*. Putten v. Penbeck, 1 Salk. 563. P. 453.

46. Although no more than a moiety of the lands of a debtor can be taken by an *elegit*; yet if two judgements are obtained by the same person, he may extend both moieties, which will be good. Gilb. Ex. 56. Hard. 23.

Huyt v. Cogan, Cro. Eliz. 482.

47. But if A. and B. recover severally against C., and A. sues out an *elegit*, and has a moiety of the lands delivered to him; and then B. sues out an *elegit*, he can only have a moiety of the lands which remain; not the whole.

48. It was formerly held by some, that upon an *elegit* the sheriff was obliged to deliver a moiety of each particular farm and tenement. But in a modern case the Court of King's Bench determined that the return was good, though separate lands were extended; provided it did not appear that they amounted in value to more than a moiety of the whole: for otherwise not only a moiety of every farm and tenement, but even a moiety of every close and field, must be delivered to the creditor. Nor could the writ be executed according to this idea, but by delivering an undivided moiety; which was entirely contrary to the meaning of the statute; for the moiety to be extended must be set out by metes and bounds.

Denn v. Abingdon, Doug. 473.

49. Lands purchased after the obtaining of a judgement may be taken upon a writ of *elegit;* and it is laid down in 1 Roll. Ab. 892, pl. 14 and 16, that execution may be sued of any land which the debtor had by purchase after the judgement, though he had aliened it before execution. So that a judgement binds all the lands whereof the debtor was seised at the time when the judgement was entered, or which he afterwards acquires; and no subsequent act of his, not even an alienation, for a valuable consideration, to a purchaser, without notice of the judgement, will avoid it.

2 P. Wms. 492.

2 Inst. 396.

50. It should, however, be observed, that any alienation of the legal estate, prior to the acknowledgement of a judgement, is good against it: even an alienation in equity will suffice. Thus Lord

Cowper has said, that articles made for a valuable consideration, and the money paid, will in equity bind the estate, and prevail against any judgement creditor, mesne between the articles and the conveyance. Finch v. Winchelsea, 1 P. Wms. 277.

51. No execution can be sued against the heir, upon a recognizance or judgement, during his minority. And where a year and a day have elapsed, from the entry of the judgement, the court concludes, *prima facie*, that the judgement is satisfied: but will grant a writ of *scire facias*, for the defendant to shew cause why the judgement should not be revived. 1 Inst. 290 *a*. 3 Comm. 421.

52. Lord Coke says, the king, by his prerogative, is to be preferred in payment of his duty or debt, before any subject, although the king's duty or debt be the later. And thereupon the law gave the king remedy by writ of protection to protect his debtor, that he should not be sued or attached, until he paid the king's debt. But hereof grew some inconvenience, for to delay other persons of their suits, the king's debts were more slowly paid; for remedy thereof it was enacted by the statute 25 Edw. III. c. 19., that the other creditors may have their actions against the king's debtor, and proceed to judgement, but not to execution. Priority of the Crown in Executions. 1 Inst. 131 *b*.

53. Lord Chief Baron Gilbert says, if the king's debt be prior upon record, it binds the lands of the debtor, into whose hands soever they come, because it is in the nature of an original feudal charge on the land; and therefore must subject every one who claims under it. But if the land were aliened in the whole, or in part, before the debt contracted, such alienee claiming prior to the charge, would not be subject to it. Gilb. Ex. 91. Tit. 1. § 72.

54. If the subjects debt be by statute or judgement, prior to the king's debt, and the king extends the Idem.

land first, the subject shall not, by any after extent, take them out of his hands. But if such judgement be extended, and the subject has the possession delivered to him by a *liberatè*, he shall hold it discharged from the king's debt. If the king's debt comes before the possession by *liberatè*, the king's extent shall be preferred; and the subject must wait till the king's debt is satisfied.

55. The reason of the difference is, because the king's debt is in the nature of a feudal charge, which if it comes on the lands, before the property of them is altered, it seises on them, as it might have done for the original service at first imposed. But if there had been a lawful alienation, before such debt, there it is not the feud of the tenant; therefore such charge cannot affect it; so that if there be a precedent judgement or statute, and a *liberatè* pursuant, before the king's extent comes down; there it cannot charge the lands, because the property is altered by the extent of the subject, which relates to the time when the judgement was given, or statute staple acknowledged; for the extent and *liberatè* of the subject was only executing such judgement or statute on the land. The execution was relative to that judgement, which was prior to the king's charge: so there was a complete alteration of property, prior to the king's charge, and before the extent came down.

Idem. 56. If the king's extent had come before the *liberatè*, he had charged the lands whilst it was in the hands of his debtor, and then his charge would be satisfied, as if it had been in the first feudal donation; for nothing can hinder the king's charge, but what amounts to a precedent alienation; but so far as there is a precedent alienation, they are not the lands of his debtor; a *liberatè* in pursuance of a preceding

judgement amounting to an alienation of the land, before it becomes charged to the king.

57. The lien upon the lands by the subject's debt, came in by the statute of Westminster 2. before that, a judgement did not bind the land. But the king's debt bound the land before that statute; and as that statute did not touch the prerogative, therefore the king has a power to levy upon the lands, notwithstanding the preceding lien by judgement: therefore the king may seise lands that are bound by a preceding judgement, whilst the lands are in the custody of the law, on the *elegit* or extent; and before they are actually delivered out to the creditor by the *liberatè*, as a satisfaction for his debt. But when they were actually delivered out to the creditor, by the *liberatè*, they then no longer belonged to the debtor, since the king's writ had delivered them over, for satisfaction of a debt that was prior to the king's; for the creditor did not take them under the burthen of the king's debt, because his lien was antecedent to the king's debt. And it were repugnant to construe him to take the land, *sub onere* of the king's debt; when he took in satisfaction of a debt precedent. Idem. Curson's Case, 3 Leon. 239. 4 Id. 10.

58. By the statute 33 Hen. VIII. c. 39. § 74., it is enacted, that where any suit is commenced, or any process awarded for the king, for the recovery of any of his debts; the same suit and process shall be preferred before the suit of any person or persons. And that the king, his heirs or successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons; so always that the king's suit be taken and commenced, or process awarded for the said debt, at the king's suit, before judgement given for the said other person or persons.

59. This statute is not confined in its operation to bond debts only; but extends to all debts and executions at the suit of the king. It is however held to be restrictive on the old prerogative; for the words "So always that the king's suit, &c." make a condition precedent. Hence therefore a judgement and execution by *elegit*, before any suit or process commenced by the king, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgement; and assigned to the king before the subject's execution.

Cecil's Case, 7 Rep. 19 *b*.

Att. Genl. v. Andrew, Hard. 23.

What may be extended.

60. All estates in fee simple in possession may be extended on a statute or recognizance, or taken by writ of *elegit*, and also estates in reversion expectant on leases for lives or years. And in this latter case, the plaintiff shall have a moiety of the reversion, and a moiety of the rent.

Campbell's Case, 1 Roll. Ab. 894.

61. Thus it was resolved in 10 Jac. that if a man leases for years, rendering rent; the reversion may be extended upon an *elegit*, during the lease; and the tenant by *elegit* shall have a moiety of the rent.

Ashburnham v. St. John, Cro. Jac. 85.

62. An estate tail may be extended, during the life of the tenant in tail. But if execution be sued out against the issue, upon a statute or judgement acknowledged by the ancestor, the issue may avoid it by assise, or writ of *audita querela*. Because a tenant in tail can only charge his estate during his life.

Tit. 2. c. 2. § 28.

Moo. 32. No. 104.

63. A rent-charge may be extended on an *elegit*; for the land being made subject to the execution, includes every thing issuing out of it. And in this case the party may distrain and avow, though the tenant never attorned; for the law creating his estate, gives him all means necessary for the enjoyment of it.

2 Inst. 397.

64. Lands held in antient demesne may be extended by *elegit*, because the title of the land is not

directly put in plea in the king's courts. This doctrine appears to have been established in a case reported by Chief Justice Hobart, but has been denied in some other cases. Cox v. Barnsby, Hob. 47. 10 Vin. Ab. 543. pl. 4.

65. The sheriff may, upon a writ of *elegit*, either extend a term for years; that is, deliver a moiety thereof to the cognizee; or sell the whole term, as a part of the personal estate, to the plaintiff, at a gross price, appraised and settled by a jury. Terms for Years. 2 Inst. 395. 8 Rep. 171 *a*.

66. If the defendant tenders the money at the time of the appraisement, and before the delivery of the term, or even after in court, the term is saved. And if it be delivered after, the defendant is entitled to a writ of *audita querela*. If no such tender be made, the property is altered by the delivery of the sheriff; and the plaintiff may either keep or dispose of it, without being accountable for the profits. If the term be extended at an annual, and not a gross value, the plaintiff is accountable for the profits. And if he receives the debt out of the term, before it expires, the defendant shall be restored to the term itself. Gilb. Ex. 34. 2 Saund. R. 68. *f*.

67. Lord Hardwicke has said, that where an execution by elegit or *fieri facias*, is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown; and a leasehold estate is also affected from that time. If the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgement creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment; but may proceed at law to sell the term; and the vendee, who is generally a friend of the plaintiff, will be entitled at law to the possession, notwithstanding such assignment. Burdon v. Kennedy, 3 Atk. 739.

68. It is enacted by the 16th section of the statute of frauds—"That no writ of *fieri facias*, or other

writ of execution, shall bind the property of the goods of the person against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, &c. to be executed. And for the better manifestation of the said time, the sheriff, &c. shall, upon the receipt of any such writ, endorse upon the back thereof the day of the month and year, whereon he or they received the same."

69. In consequence of this statute it has been generally held that if a term for years be assigned to a *bonâ fide* purchaser, before execution is actually sued out, and delivered to the sheriff, it cannot afterwards be taken by a creditor.

Rigge on Register.

70. This doctrine has been doubted by the late Mr. Serjeant Hill, who appears to have been of opinion that the reasoning deduced from the case of an execution by *fieri facias* did not apply to a writ of *elegit;* and that the statute of frauds had not altered the law, with respect to an *elegit.*

Trust Estates, Tit. 12. c. 2.

71. It has been already stated that by the statute of frauds, trust estates of freehold may be taken in execution on an *elegit* for the debts of the *cestui que trust*; but that if a trustee has conveyed the lands, by the direction of the *cestui que trust,* before execution sued, though he was seised in trust for the debtor, at the time of the judgement, the lands cannot be taken in execution: for the words of the statute are,—"at the time of the said execution sued," which refer to the seisin of the trustee.

72. This doctrine appears to have been settled in the following case:

Hunt v. Coles, Com. R. 226

H. Chamberlain being *cestui que trust* in fee of lands, J. Boardman the lessor of the plaintiff recovered a judgement against him for 160*l.* Chamberlain borrowed 600*l.* of the defendant Coles, and for securing

that sum, the trustee of the legal estate, by the direction of Chamberlain, mortgaged the premises to Coles for 500 years. Boardman took out execution by writ of *elegit*: the sheriff, after an inquisition, by which it was found that Chamberlain was seised in fee, extended one moiety, and delivered it to the lessor of the plaintiff. The doubt was whether he had any title by the statute of frauds; after argument by Comyns and Sir C. Phipps it was determined by Mr. Justice Tracey that the execution was not good. For the words, "at the time of the said execution sued," refer to the seisin of the trustee. Therefore if the trustee had conveyed the land, before the execution sued, though he was seised in trust for the defendant, at the time of the judgement, the lands could not be taken in execution.

Sir Edward Northey said that since the act, such construction had been thought agreeable to the statute; though he did not know that it ever had been judicially determined. A case was mentioned by Mr. Justice Tracey from Serjeant Cheshire's notes, where this opinion seemed to be allowed by Lord Trevor, and not contradicted by the court.

73. It is also observeable that Lord Chief Baron Comyns, who argued and reported this case, states the law accordingly in his Digest; where after mentioning several things not liable to execution, he says, "Nor since the statute 29 Cha. II. c. 3., lands which the trustee has aliened before execution; for they are not bound by the judgement." Tit. Execution, c. 14.

74. There are several things not liable to an extent under a statute recognizance or judgement. Thus an advowson in gross cannot be extended on an *elegit*, for reasons which will be given in a subsequent title. What is not liable to an Extent. Tit. 21.

Jenk. 207.

75. A writ of *elegit* does not lie of the glebe belonging to a parsonage, or vicarage, or of the church yard; for each of these are, *solum Deo consecratum.*

Tit. 18. c. 1. Tit. 19 & 20.

76. An estate in joint-tenancy cannot be extended, after the death of the joint-tenant who acknowledged the judgement; but an estate in coparcenary or in common may be extended.

Scott v. Scholey, 8 East. 467. Tit. 15. c. 3.

77. It has been held in a modern case, that a mere equitable interest in a term for years cannot be extended, nor is an equity of redemption extendible.

1 P. Wms. 278.

78. If a trustee acknowledges a judgement or statute, though, at law, these are liens upon the estate, yet, in equity, they will not affect it, because a judgement is only a general security; not a specific lien on the land.

Tit. 10. c. 3.

79. It has been already stated that the statute of Westm. 2., which gives the writ of *eligit*, does not extend to copyholds; for if it did the lord might have a tenant brought upon him, without his admittance, or consent.

These Estates are only Chattels. 1 Inst. 42 *a.* 2 — 396.

80. Upon the entry of the cognizee into the lands extended, he is called tenant by statute merchant, statute staple, or *elegit.* And although the estates thus acquired are uncertain, as to their duration, being determinable only on payment of the debt, and that persons holding such estates shall have the same remedy by assise as freeholders, yet they are but chattels; which vest in executors or administrators.

Fitz. N. B. 58. H.

81. Persons holding estates of this kind are punishable for waste by writ of waste, or by an action of account; in which case the debtor shall have a *venire facias ad computandum* for the waste, and recover damages for the surplus.

82. It was formerly held that these estates, like terms for years, might be barred by a recovery, suffered by the persons who had the freehold; but they are protected by the statute 27 Hen. VIII. c. 15. from the effects of a recovery of the freehold. Tit. 36.

Must be executed by Entry.

83. The estate acquired by the execution of a statute, recognizance, or judgement, must be executed by an actual entry of the cognizee; for till entry he has but a bare right, which is not assignable. So that although he should release all his right to the land, yet he may extend it after. All he acquires is a lien on the land; but it is not certain whether he will ever make use of it, for he may recover the debt out of the goods of the cognizor, by a *scire facias*, or take his body; and then during the debtor's life, he can have no execution.

Hannam v. Woodford, 4 Mod. 48.

84. Upon the death of the cognizee of a statute, his administrator sued out an extent, and the *liberatè* being returned, he assigned over the lands without making an actual entry: the question was, whether the assignment was good or not.

It was determined that the assignment was void; for by the return of the *liberatè* he had accepted of the possession, and was estopped to say the contrary. Then when the owner still continued in possession, it turned the possession which the administrator had accepted by the *liberatè* to a mere right, which was not assignable. Nor was it like an *interesse termini*, which the lessee might assign over before entry; because in that case the lessor is the principal agent, and has done every thing on his part to transfer an interest to the lessee, which he may execute at pleasure. Tit. 8. c. 1.

Saund. R. 69. c. n. 3.

85. The sheriff does not now, as formerly, on a writ of *elegit*, deliver actual, but only legal possession

of a moiety of the lands. In order to obtain actual possession the plaintiff must proceed by ejectment, in which he must not only prove the judgement, and by the judgement roll, that an *elegit* issued, and was returned, but must also prove the writ of *elegit* by a true copy thereof, as well as the inquisition that was taken thereon.

86. Where a plaintiff in ejectment claims under an *elegit*, and there is a person in possession, under a lease made prior to the judgement, upon which the *elegit* was sued out, he cannot recover.

Doe v. Wharton, 8 Term R. 2.

87. In ejectment the plaintiff claimed under an *elegit*, against one Wharton: an objection was taken at the trial by the defendants, that the tenant in possession enjoyed under a lease granted to him by Wharton, prior to the date of the plaintiff's judgement: therefore that the plaintiff could not succeed in this ejectment. To this it was answered, on the part of the lessor of the plaintiff, that he had given the tenant notice he did not mean to disturb his possession; his object being only to get into the receipt of the rents and profits of the estate; and that the defendants ought therefore not to be permitted to set up this objection.

Mr. Justice Lawrence, before whom the cause was tried, was of opinion, that the party who had the legal estate must prevail in an ejectment; and that as the tenant's title accrued prior to that of the lessor of the plaintiff, the latter could not succeed in this ejectment. The Court of King's Bench was of the same opinion.

Tit. 12. c. 3. § 54.

Campbell's Case, ante, § 61.

88. It has however been already stated, that where there are subsisting leases made prior to the signing of a judgement, the cognizee may extend a moiety of the reversion, and of the rent, upon his *elegit*; and after such extent, he may, by the usual process of

ejectment, have all such remedies to recover a moiety of the rent, as the cognizor himself might have had for the whole, before the extent, or will have, after it, for the other moiety.

Remedies upon Eviction.

89. The statute 13 Edw. I. gave to tenants by statute merchant a writ of novel disseisin, in case their possession was disturbed. But if the eviction was upon good title, the cognizee had no further remedy.

90. The statute of the staple also gives the creditor, if ousted of the lands taken in execution, a means of recovering them by writ of novel disseisin, and by the statute 23 Hen. VIII. c. 6. § 9., persons having execution of lands by reason of a recognizance, in the nature of a statute staple, their executors, administrators, or assigns, where they are disseised, shall have like remedy as persons having execution on a statute staple.

91. The statute of Westm. 2. c. 18. gives the tenant by *elegit* a writ of novel disseisin, if ejected; and after a writ of re-disseisin if need be. Lord Coke observes, that his executors and administrators shall have the same remedy, by the equity of the act, as also the executors and administrators of tenants by statute merchant, and statute staple. 2 Inst. 397.

92. By the common law, after a full and perfect execution had, by extent returned, and entered on record, the cognizee could have no new extent on the effects of the cognizor; because there was once satisfaction given to the creditor, on record, though the lands had been recovered from him before he had levied his debt. 1 Inst. 290 *a*.

93. This doctrine was altered by the statute 32 Hen. VIII. c. 5. by which it is enacted, That if after any lands be delivered in execution on just cause, they shall be recovered, divested, taken, or evicted

out of, or from the possession of any such person, &c. before such times as the said tenants by execution, their executors or assigns, shall have fully levied their debt and damages, for which the said lands, &c. were taken in execution; then every such recoveror, obligee, and cognizee shall have a *scire facias* out of the same court, from whence the former execution proceeded, against the person or persons on whom the former execution was pursued, their heirs, executors, or assigns, to have execution of other lands, &c. liable and to be taken in execution, for the residue of the debt and damages.

1 Inst. 289 *b.* 11 Vin. Ab. 32.

94. Lord Coke has laid down the following rules for the construction of this statute:

First—Where the tenant by execution has a remedy given him by law, after eviction, there the statute extends not. For the act says, by reason whereof the said recoverors, obligees, and cognizees have been clearly set without remedy, &c. For the body refers to the preamble; and the party ought not to have double satisfaction, one by the former laws, and another by this statute.

95. Therefore if part of the land be evicted from the tenant by execution, this statute does not extend to it; because he shall hold the residue till he is fully satisfied: if all be evicted, saving one acre, he must be contented to hold that, for he can have no new execution upon this statute.

In the case of recognizances, this inconvenience seems to be removed by the statute 8 Geo. I. c. 25. § 4. which has been already stated.

ante, § 42.

96. Secondly—If a man be bound to A. in a statute of 1,000 *l.*, and by a latter statute to B. in 100 *l.* B. first extends, then A. extends, and takes the lands from B., yet B. shall have no aid of the statute: be-

cause after the extent of A., B. shall re-enjoy the land, by force of his former execution.

97. Thirdly—If the wife of the cognizor recover dower against the tenant by execution, he shall hold over, and shall have no aid of this statute.

98. Fourthly—If a man puts out his lessee for years, or disseises his lessee for life; after, acknowledges a statute, on which execution is sued against him, and the lessees re-enter; the tenant by execution, after the leases ended, shall hold over, and have no aid of this statute.

99. Fifthly—This statute must not be taken literally, but according to the meaning. Therefore where the letter is, until he, &c. or his assigns shall fully and wholly have levied the whole debt, or damages; if he hath assigned several parcels to several assignees, yet all these shall have the land, but till the whole debt be paid.

100. Sixthly—Where the words are, for the which the said lands, &c. were delivered in execution; a disseisor conveys lands to the king, who grants the same over to A. and his heirs, to hold by fealty and 20*l.* rent, and after grants the seignory to B.; B. acknowledges a statute, and execution is sued of the seignory: A. dies without heir, the cognizee enters and is evicted by the disseisee. He shall have the aid of this statute, yet it is out of the letter of the law; for the seignory was delivered in execution, and not the tenancy. But he was tenant by execution of those lands, therefore within the statute.

101. Seventhly—Where the words are "delivered and taken in execution," yet if after the *liberate*, the cognizee enter, as he may, so as the land is never delivered, yet he is within the remedy of this statute; for he is tenant by execution.

102. Eighthly—Where the statute says, "Then every such recoveror, obligee, and cognizee, shall, &c." and says not, their executors, administrators, or assigns, but they are omitted in this material place; yet, by a benign interpretation, the statute shall extend to them, because they are mentioned in the next precedent clause of the eviction; and the remedy must, by construction, be extended to all the persons that appear by the act to be grieved.

103. Ninthly—When the statute gives a *scire facias* out of the same court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution, that is evicted, shall have a *scire facias*, by the equity of this statute, out of that court; because the *scire facias* must be grounded upon the record.

104. Tenthly—Where the statute gives the *scire facias* against such person or persons, &c. that were parties to the first execution, their heirs, executors, or assigns, &c. this must not be taken so generally as the letter is. For if the first execution was had against a purchaser, &c. so as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *scire facias* shall be awarded against him, his heirs, executors, or assigns. If he had other lands subject to the execution, then a *scire facias* lies against him or his assignees; not against his executors. Neither in that case can he have a *scire facias* upon this statute against the first debtor or cognizor, because it gives it only against him, &c. that was party to the first execution, his heirs, executors, or assigns. But if there be several assignees of several parcels of land, subject to the execution, one *scire facias* upon the statute shall lie against all of them.

105. As to the duration of these estates, the law allows the creditor to hold until he has recovered all the money due to him. In the case of a statute, the creditor is also entitled to costs: and as the sheriff is directed to make a reasonable extent of the land, it follows, that, upon a computation of the debt, and the value of the lands, it may be easily known how long the extent may continue, and when the debtor will be entitled to have his land again. How long they may endure.

106. In the case of any disseisin or interruption by a stranger, the cognizee shall not hold over the time of the extent, but is to have satisfaction for the injury done him from such stranger. If the cognizee himself gives the tenant by statute or *elegit* any interruption, or prevents him from taking the profits, there the tenant may either hold over, or bring an action against the cognizor. For as in the first case it would be unreasonable to punish the cognizor for the act of a stranger, by keeping him out of his lands, so in the last case it would be equally unreasonable to permit the cognizor, by any act of his own, to turn the cognizee out of the land, before he had received his debt. 4 Rep. 82 *a*. 2 Roll. Ab. 478.

107. If the tenant by statute or *elegit* suffers the land to lie waste, or neglects to levy the debt out of it, these being his own acts, it is but reasonable he should suffer by them; and not hold over the land, to the prejudice of the cognizor. On the other hand, where there is no fault or negligence in the cognizee, but he is prevented from making the usual profits of the land by the act of God, there the cognizee shall hold over the time of the extent; for it would be unreasonable to punish him for that which no industry of his could prevent. Idem.

How they are determined.

108. With respect to the manner in which estates of this kind are determined, there is a considerable difference between estates held by statute merchant, statute staple, and recognizance, and those held under a writ of *elegit*.

4 Rep. 67 a. 2 Roll. Ab. 479.

109. In the case of an extent under a statute or recognizance, the cognizor cannot enter, without suing out a writ of *scire facias ad rehabendum terram*; because in these cases the tenant is entitled to hold the land, not only until the principal debt be levied, but also all costs, damages, and expences arising from it. And as the costs are not ascertained, no entry, which is but an act in *pais*, can defeat a matter of record, until such costs and damages are ascertained by writ of *scire facias*.

Deighton v. Greenvill, Tit. 35. c. 11.

110. In the case of an extent under a statute or recognizance, the only proper determination of the estate held under it, is the entry of satisfaction upon the record, or perception of the profits appearing upon record: and a person having a second extent, has no title of entry until then.

111. In the case of an *elegit*, where the debt is certain, no damages or expences being allowed, and the annual value of the land being ascertained by the inquisition and extent, when a sufficient time has elapsed to enable the creditor to receive what was due to him from the rents, there is no reason to object to the entry of the cognizor; which is therefore lawful.

2 Roll. Ab. 479.

112. Where the tenant by *elegit* is satisfied his debt, by some casual profits, the cognizor cannot enter, but must bring a *scire facias*: because such accidental profit does not appear in the valuation of the lands, which is stated upon the record.

113. No *scire facias* lies upon a general averment that the cognizee has levied the debt, before the time of the extent expired: because this may happen by the cognizee's industry in improving the land, of which the debtor cannot take advantage. Id. 483. Bac. Ab. Execution, B. 7.

114. But if the cognizee has levied part of the debt by the felling of timber, and has received the rest, as appears from an acquittance, the cognizor shall have a writ of *scire facias*. The reason is, because the object of the extent being only to satisfy the cognizee his reasonable demands, whenever it appears to the court that they are answered, whether by perception of the profits, or otherwise, they will grant a *scire facias* to avoid the extent, and to reinstate the cognizor in his former possession; since the end for which it is given is answered. Idem.

115. If the cognizee has levied part of the debt according to the extent, the cognizor, upon tender of the residue in court, shall have a *scire facias* to recover possession of his land, within the time of the extent. For here it appears on record how much was due at first, how much was paid, and what remains due. And the object of the extent being to satisfy the cognizee of his just debt, whenever that appears to the court to have been done, the estate shall cease. But if the cognizor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the cognizor, in neither of these cases would a *scire facias* be granted; because it did not appear upon record that the debt was paid. Idem.

116. A question having arisen in the Court of Chancery, whether upon an *elegit* the plaintiff was entitled to interest beyond the penalty of a judgement, Lord Hardwicke said, that at law, upon a judgement entered up, it was the *debitum recuperatum*, Godfrey v. Watson, 3 Atk. 517.

and the stated damages between the parties; but if the creditor did not take out a *fieri facias* against the person of the debtor, or his personal estate, but extended the lands by *elegit*, which the sheriff did only at the annual value, and much below the real, the creditor held *quousque debitum satisfactum fuerit;* and at law the debtor could not, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value. But if the debtor came into a court of equity for relief, the court would give it to him, by obliging the creditor to account for the whole that he had received; and, as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the penalty. His Lordship said, he remembered very well, upon Serjeant Whitaker's insisting before Lord Cowper, that this would be repealing the statute of Westminster, Lord Cowper said, he would not repeal the statute; but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.

2 Vent. 238.

117. When the plaintiff or cognizee's demand is satisfied in this, or in any other way, satisfaction ought to be entered on the record of the judgement; or else it should be assigned to a trustee for the owner of the lands.

The Crown may sell under an Extent.

118. It was doubted whether, under the statute 13 Eliz. c. 4. § 2. a sale of the debtor's lands could be made by the crown, after the death of the debtor. To remedy this, an act was passed in 27 Eliz. c. 3. by which it was enacted, that the crown might make a sale of accountants lands, as well after their death as in their lifetime. Afterwards by the statute 39 Eliz. c. 7. this explanatory act was repealed, and

a power was given to the crown to sell accountants or debtors lands in their lifetime. This act, being only temporary, expired, and the explanatory act of 27 Eliz. was revived; but, being found extremely defective, the following act was made for this purpose.

119. By the statute 25 Geo. III. c. 35. it is enacted, that it shall be lawful for the Court of Exchequer, on the application of the Attorney General, in a summary way by motion, to order that the right and interest of any debtor to his majesty, and of the heirs and assigns of such debtor, in any lands which had been or shall be extended, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been extended, shall be sold, in such manner as the court shall direct: That when a purchaser shall be found, the conveyance of the lands, so decreed to be made, shall be made by the remembrancer of the court or his deputy, under the direction of the court, by deed of bargain and sale, to be enrolled in the said court; and that from and after the making of such conveyance, and the enrolment thereof, the bargainee and his heirs shall hold the lands therein comprised for his own use, not only against the extent of the crown, but also against such debtor, or the surety or sureties of such debtor, and all persons claiming under such debtor, or the surety or sureties, unless by a title paramount to, and available in law against such extent: That all monies which shall become payable from any such purchaser, shall be paid and applied towards discharge of the debt due to the crown, and of all costs and expences incurred by the crown, in enforcing the payment of such debt, in such manner as the court shall order and direct: and if there shall be any surplus arising from any such sale, the said surplus shall belong to

the same person as would be entitled to the lands sold, if there had not been a sale thereof.

A Statute, &c. protects Purchasers. Tit. 12. c. 3. § 33.

120. It has been already stated that a purchaser, without notice of any incumbrances, shall protect himself from them, by obtaining an assignment to a trustee for himself of a prior term for years. The same doctrine has been extended to statutes, recognizances and judgements.

Anon. 2 Cha. Ca. 208.

121. Thus where a purchaser of land incumbered with two statutes, purchased in the first, having no notice of the second. Lord Nottingham said—"If he had no notice of the second statute, before he was dipped in the purchase, he shall defend himself by the first statute, whether the same were paid off or no. If he can at law do it, equity will not hurt him."

Huntingdon v. Greenville, 1 Vern. 49.

122. Lord Huntingdon bought a statute affecting certain lands; two years after he purchased the lands. There was another statute subsequent to that bought in by Lord H., but prior to his purchase, of which Lord H. had notice at the time when he bought the lands.

The court was of opinion, that although the statute was bought in before the purchase, yet that made no difference in the case, but was as good as if it had been bought in afterwards; therefore Lord H. should be looked upon as a purchaser, having such security to protect his purchase.

123. The effect of getting in old statutes, recognizances, and judgements, in protecting mortgagees, will be discussed in the next title.

TITLE XV.

MORTGAGE.

CHAP. I.

Of the Origin and Nature of Mortgages.

CHAP. II.

Of the several Interests of the Mortgagor and Mortgagee.

CHAP. III.

Of an Equity of Redemption.

CHAP. IV.

Of the Payment of the Mortgage Money and Interest.

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Of the Order in which Mortgages are to be paid, and the Means of gaining a Priority.

CHAP. VI.

Of Foreclosure.

CHAP. I.

Of the Origin and Nature of Mortgages.

1. *Origin of Mortgages.*
7. *Interposition of the Court of Chancery.*
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16. *Mortgages in Fee or for Years.*
19. *Welsh Mortgages.*
20. *Equitable Mortgages.*
21. *All Restraints on Redemption are void.*
32. *Unless there is an Agreement for a Purchase.*
38. *Cases of Conditional Purchases.*
42. *A Power of Sale may be given.*

SECTION 1.

Origin of Mortgages.

THE second kind of estate held as a pledge or security for the repayment of money, is where lands and tenements are conveyed by the debtor to the creditor for that purpose.

Lib. 10. c. 8. Grand Coust. c. 20.

2. In the reign of Henry II. two modes of pledging lands were in use, which are fully described by Glanville, and appear to have been adopted from the customary law of Normandy.

The first of these was called *Vivum Vadium*, and was a conveyance of lands by a debtor to his creditor, to hold until the rents and profits should amount to the sum borrowed; in which case the pledge was said to be living, for, on discharge of the debt, it returned to the borrower.

3. The second mode of pledging land was called *Mortuum Vadium*, and is thus described by Littleton, § 332.—"If a feoffment be made upon such condition that if the feoffor pay to the feoffee 40 *l.* of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, as *Mort Gage*, and in Latin *Mortuum Vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land which is put in pledge, upon condition for the payment of the money, is taken from him for ever; and so dead to him upon condition."

Madox Form. No. 560.

4. It appears from this passage that a mortgage was created by a conveyance of the lands, from the debtor to the creditor, with a condition, that if the money was paid on a certain day, the conveyance should be void, and the debtor might enter, and have his former estate. But if default was made in pay-

ment of the money on the day appointed, then the lands became absolutely vested in the creditor, freed from the condition. And all the maxims of the common law respecting the breach of a condition were strictly applied to this kind of conveyance. Kyghly's Case, Dyer, 369 *a.* Tit. 13. c. 2.

5. This mode of pledging lands was attended with great inconveniences. If the money was not paid on the very day named in the deed, the lands were absolutely forfeited, nor would any subsequent tender of the money avail the creditor; although the estate mortgaged were of much greater value than the sum borrowed.

6. Notwithstanding the obvious injustice of this doctrine, the courts of common law would not allow of the smallest degree of liberality in the construction of these kind of conditions. For in the only two cases reported by Lord Coke respecting mortgages, the judges appear to have held that an estate mortgaged was absolutely forfeited and lost, if the condition was not really and *bonâ fide* performed. Goodall's Case, 5 Rep. 96. Wade's Case, Id. 114.

7. The doctrine adopted by the courts of common law, respecting mortgages, being totally contrary to the spirit of this species of contract, and to the principles of justice, by subjecting those who borrowed money on the security of their lands, to the total loss of them, on the non-performance of the condition; the Court of Chancery was induced to interpose, and by an equitable and liberal construction to mitigate the rigour of the common-law, in cases of this nature. Interposition of the Court of Chancery.

8. It was obvious that lands mortgaged were only meant to become a security for the payment of what was borrowed; as it never could be the intention of a person who mortgaged his lands, that a large estate

should become the absolute property of a creditor, if a sum of money, much inferior to the value of such estate, was not paid on the day appointed. The Court of Chancery therefore resolved that a condition of this kind was in the nature of a penalty, against which equity ought to relieve; that all the creditor could, in justice and conscience be entitled to, was his principal, interest, and costs; and established it as a ruling maxim, that although the condition was not strictly performed, by which the estate was forfeited at law, yet if the debtor paid the money borrowed, and interest, within a reasonable time, he should be entitled to call on the creditor for a reconveyance of his lands.

9. This right acquired the name of an equity of redemption; but it is not ascertained when it was first allowed. Lord Hale is reported to have said, that in 14 Rich. II. the parliament refused to admit of an equity of redemption. This appears to be a mistake; for in the case alluded to by Lord Hale, and of which he has stated a part in his History of the Common Law, Ch. 3. the mortgagor asserted that he had paid the money, and prayed to have his lands again; nor did the idea of an equity of redemption exist for some centuries after: for although Tothill has mentioned a case in 37 Eliz., where a mortgagor had a decree in chancery for a reconveyance of lands mortgaged, yet no mention is made by Lord Coke of an equity of redemption; from which it may be presumed that it was not then generally known. It is however probable that this doctrine was introduced in the reign of James I., when the Court of Chancery had established its equitable jurisdiction. And in the first year of Charles I. there is a case in which this right is supported, as a thing of course.

1 Cha. Ca. 219.

Rot. Parl. V. 3. p. 258.

Emanuel Coll. v. Evans, 1 Cha. Rep. 10.

10. After the allowance of an equity of redemption, there still remained some legal scruples, which subjected the mortgagor to great inconveniences. It was conceived that where the condition was not strictly performed, by the payment of the money on the day mentioned in the conveyance, the lands became liable to all the legal charges of the mortgagee; to the dower of his wife, to forfeiture, and escheat; and that the mortgagor could have no relief against those who came in, in the post. But the Court of Chancery, as it increased in power, has set this matter right, and has established a redemption, not only against the tenant in dower, and all those who claim under the mortgagee; but also against the lord by escheat, and all others who come in, in the post; because in equity the payment of the money puts the mortgagor in *statu quo;* since the lands were originally conveyed as a security only for the money borrowed.

Nash v. Preston, Cro. Car. 190.

Treat. of Eq. B. 3. c. 1. § 2.

11. A mortgage may therefore be described to be a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of a sum of money borrowed; with a proviso that such conveyance shall be void on payment of the money and interest, on a certain day; and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still an equity of redemption; that is, a right in equity, on payment of the principal, interest, and costs, within a reasonable time, to call for a reconveyance of the lands.

Description of a Mortgage.

12. It was formerly a practice to make a mortgage by an absolute conveyance; with a defeazance or clause of redemption in a separate deed. Lord Talbot has said that this was a wrong way, and to him always

Forrest Rep. 63.

appeared with a face of fraud; for the defeazance might be lost, and then an absolute conveyance set up: he would discourage the practice as much as possible. And Lord Hardwicke has said, that wherever the court finds a clause of redemption in a separate deed, it adheres to it strictly; to prevent the equity of redemption from being entangled, to the prejudice of the mortgagor.

Baker v. Wind, 1 Ves. 160.

13. The Court of Chancery having thus extended its protection to the mortgagor, by allowing him to redeem his estate after it was forfeited at law, it also gave the mortgagee a right, in a reasonable time after forfeiture, to call on the mortgagor for payment of his money, or else to be for ever foreclosed, or excluded from any further equity of redemption.

14. As money borrowed on mortgage is seldom paid on the day appointed, mortgages are now become entirely subject to the Court of Chancery; where it is an established rule that the mortgagee holds the estate merely as a pledge or security for the repayment of his money: therefore a mortgage is considered in equity as personal estate. The mortgagor is held to be the real owner of the land, the debt being esteemed the principal, and the land the accessory: whenever the debt is discharged, the interest of the mortgagee in the land determines of course; and he is looked on in equity as a trustee only for the mortgagor.

15. In all modern mortgages there is a covenant inserted from the mortgagor, for himself, his heirs, executors, and administrators, to repay the money borrowed, with interest; which creates a personal contract between the mortgagor and the mortgagee, for the payment of the money.

16. Mortgages are of two sorts: either the lands are conveyed to the mortgagee and his heirs in fee-simple, with a proviso, that if the mortgagor pays the money borrowed on a certain day, the mortgagee will reconvey the lands, or else the lands are conveyed to the mortgagee, his executors, administrators, and assigns, for a long term of years; with a proviso, that if the money be paid on a certain day, the term shall cease, and become void. Mortgages in Fee, or for Years.

17. In the case of mortgages for terms of years, if the money is not paid on the day appointed, the estate becomes absolutely vested, at law, in the mortgagee, for the residue of the term. And although a court of equity allows the mortgagor to redeem within a reasonable time, by paying the principal, interest, and costs, yet such payment only gives the mortgagor an equitable right to the term.

18. Mortgages for years are attended with this advantage, that on the death of the mortgagee, the term and the right to receive the mortgage debt vest in the same person, whereas in the case of a mortgage in fee, the estate, on the death of the mortgagee, goes to his heir or devisee; and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconveniences, both to the mortgagor and the representatives of the mortgagee. On the other hand, in the case of mortgages for years, there is this defect, that if the right of redemption is abandoned or foreclosed, the mortgagee, or his personal representatives, will only be entitled to the term: to guard against this, it has been thought advisable, in some cases, to make the mortgagor covenant that, on nonpayment of the money, he will not only confirm the term, but also convey the freehold and inheritance to the mort-

gagee, or as he shall appoint, discharged from all right of redemption.

Welsh Mortgages.

19. There is another kind of mortgage, where the proviso for redemption does not oblige the mortgagor to pay the money on a particular day, but allows him to do it at any indefinite time. This is called a Welsh mortgage, in which there is a perpetual right of redemption.

infra, c. 3.

Equitable Mortgages.

20. Legal mortgages are made by a transfer of the legal estate to the mortgagee, by a regular conveyance. But an agreement in writing to transfer an estate as a security for the repayment of a sum of money borrowed, or even a deposit of title deeds, will create what is called an equitable mortgage.

Edge v. Worthington, 1 Cox R. 211.

All Restraints on Redemption are void.

21. When the Court of Chancery assumed a jurisdiction over mortgages, it became an established rule there, that every conveyance of a real estate, for the purpose of securing the repayment of a sum of money, should be considered as a mortgage: that all restraints imposed upon the equity of redemption should be relieved against; being in fact terms extorted from the necessities of the borrower, and tending to usury and oppression. The right of redemption is therefore considered in equity as inseparably incident to a mortgage, and cannot be restrained by any clause or agreement whatever; it being a rule, that what was once a mortgage, must always continue to be a mortgage.

Jason v. Eyres, 2 Cha. Ca. 32.

22. Thus a proviso to redeem, during the life of the mortgagor only, was held void, and it was decreed that the heir of the mortgagor should notwithstanding redeem.

Orde v. Smith, infra, c. 3.

23. So where the right of redemption was restrained to the mortgagor himself, or the heirs of his body, it was held void; and a jointress was allowed to redeem.

24. Lands were mortgaged, with a special clause, that if the mortgagor, or the heirs male of his body, should pay the money borrowed, they might re-enter; and the mortgagor agreed that no one but himself, or the heirs male of his body, should be admitted to redeem. The mortgagor having died without issue, the plaintiff, being a jointress of part of the lands, brought her bill to redeem the mortgage. Howard v. Harris, 1 Vern. 33. 190.

It was insisted for her, 1. That restrictions of redemption in mortgages had always been discouraged, as it would be a thing of mischievous consequence should they prevail; for then it would become a common practice, and a trade amongst scriveners, to fetter mortgagors, so as to make it impracticable for them to redeem, according to the precise letter of the agreement. 2. It was a maxim in chancery that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed: and a mortgage can no more be irredeemable, than a distress for a rent-charge irrepleviable.

After long debate, the Lord Keeper decreed that the mortgage should be redeemed; the rather because the defendant had a covenant for repayment of his mortgage money.

25. Where lands are mortgaged, no agreement made at the time, that in case the money is not paid on a particular day, the conveyance shall become absolute, will be allowed in chancery.

26. A person seised of lands worth 200*l. per annum* mortgaged the same for 250*l.*, and executed a deed for the absolute conveyance of them to the mortgagee, if the money was not paid at the end of seven years. The Master of the Rolls, assisted by Mr. Justice Hyde, decreed a redemption; for the mortgagee's father having exhibited a bill against the mortgagor for the Bowen v. Edwards, 2 Rep. in Cha. 221.

land, or the money, made it evident that it was a mortgage; therefore no agreement could take away the right of redemption.

27. An agreement that in case money lent on mortgage is not paid on the day appointed, then that upon payment of a further sum by the mortgagee, the conveyance shall become absolute, will not be allowed.

Willett v. Winnell, 1 Vern. 488.

28. A person mortgaged his estate for 200 *l.*, and at the same time entered into a bond conditioned that if the 200 *l.* and interest was not paid at the day, then if the mortgagee should pay the mortgagor the further sum of 78 *l.* in full for the purchase of the premises, within ten days after, the bond should be void, or else should stand in full force. The mortgagor died before the mortgage became forfeited, leaving his son an infant, and the 200 *l.* not being paid at the day, the mortgagee paid the 78 *l.* The son of the mortgagor brought his bill to redeem; the defendant, by his answer, insisted that it was an absolute purchase; but the court decreed a redemption.

Jennings v. Ward, 2 Vern. 520.

29. The defendant Ward lent 16,000 *l.* to one Neale on mortgage, to carry on his buildings; and in another deed, executed at the same time, he took a covenant from Neale that he would convey to him, if he thought fit, ground rents to the value of 16,000 *l.*, at the rate of 20 years purchase. The bill being to redeem, the defendant insisted on that agreement: the Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement, setting it aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it; or clog the redemption with any bye agreement.

30. No subsequent agreement entered into by the creditors and assignees of a mortgagee, to restrain the

right of redemption to a particular period, will be deemed valid in equity.

31. A person having made a mortgage, and the equity of redemption being subject to the payment of several debts, the mortgagee exhibited his bill against the mortgagor, and all the creditors, that they should redeem, or be foreclosed. Greaves, who was one of the defendants, and also a creditor, paid the mortgage money with the consent of the other creditors; and agreed with them, that if they would pay the money advanced by him, at a further day, they should redeem; otherwise that he should have the lands absolutely. The creditors failed to pay the money at the time agreed on; Greaves enjoyed the lands for 20 years, after which the creditors exhibited their bill to redeem. Exton v. Greaves, 1 Vern. 138.

The Lord Keeper decreed a redemption, because those lands, by the new agreement, became a mortgage, in respect of the other creditors, in the hands of the defendant; in regard of the trusts and confidence which they had in the defendant, being all creditors alike; and principally because the mortgagee had assigned to Greaves his mortgage only, not the benefit of the decree for foreclosing the redemption.

32. A distinction has been made by the Court of Chancery between contracts originally founded upon lending and borrowing money, with an agreement for a purchase in a certain event; and cases where, after a mortgage, a new agreement has been entered into, and executed by the parties, for an absolute purchase, although there be a subsequent declaration that the mortgagor may have his estate upon payment of principal, interest, and costs; or where a release of the equity of redemption is given, with a Unless there is an Agreement for a Purchase.

collateral agreement to reconvey upon repayment of the purchase money; for in these cases it has been determined that no repurchase shall be had, unless upon a strict performance of the conditions stipulated.

Cotterel v. Purchase, Ca. Temp. Talbot, 61.

33. A., being a joint-tenant with B. her sister, made an absolute conveyance to C. in fee for 104 *l.*, which was admitted to be intended only as a mortgage. Some time after, in 1708, those deeds were cancelled; and then A., in consideration of 184 *l.*, including the 104 *l.*, paid by C., conveyed the estate *ut supra*, but with a further covenant, not to agree to any partition without C.'s consent. B. was in possession till 1710, when C. ejecting her out of her moiety, enjoyed it quietly till 1726, at which time A. brought a bill for redemption, to which C. pleaded himself an absolute purchaser: the receipts given for the money mentioned it to be purchase money. In 1710 there was an agreement that A. might have the estate again if desired, on payment of principal, interest, and charges. The cause was first heard before the Master of the Rolls, who dismissed the bill: afterwards it came on before Lord Talbot, who observed the case was very dark. The first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vague and ridiculous; but that it would be equally so, if the deed was supposed to be an actual conveyance; so that it was of no great weight, and ought to be laid out of the question: that he was inclined upon the whole to think the conveyance in 1708 was at first an absolute conveyance; the agreement in 1710 for the repurchase shewed it was not redeemable

at first; the acquiescence of 16 years upon C.'s possession was strong evidence of it. The decree was affirmed upon the circumstances of the case.

34. Lands in Wales were mortgaged for 400*l.* Afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from the mortgagor, upon payment of 350*l.* more. A note was given at the time of executing the lease, that the releasee, on payment of the 750*l.*, and all charges of repairs, within a year by the releasor, would sell and convey to him the premises. Payment having been neglected for 16 years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned; but not that the releasor should be at liberty to redeem the same. The decree was affirmed by the House of Lords.

Endsworth v. Griffith, 2 Ab. Eq. 595.

5 Bro. Parl. Ca. 184.

35. Where money is lent by one relation to another, with a proviso that if it be not repaid on a certain day, the land shall be settled in a particular manner, for the benefit of the family; a court of equity will not decree a redemption.

36. A., in consideration of 1000*l.*, made an absolute conveyance to B. of the reversion of certain lands, after two lives, which at that time were worth little more; by another deed of the same date, the lands were made redeemable at any time during the life of the grantor only, on payment of 1000*l.* and interest. A. died, not having paid the money: it was held by Lord Nottingham, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage, always a mortgage;* that B. might have compelled A. to redeem in his lifetime,

Bonham v. Newcomb, 2 Vent. 364. 1 Ab. Eq. 312.

or have foreclosed him. But, on a re-hearing, Lord Keeper North reversed the decree, on the circumstances of the case; for it appeared by proof, that A. had a kindness for B., and that he had married his kinswoman, which made it in the nature of a marriage settlement. He likewise held, that B. could not have compelled A. to redeem during his life; which made it the more strong.

King v. Bromley, 2 Ab.Eq.595.

37. A., seised of a copyhold in fee, surrendered it upon his marriage, to the use of himself and his wife, in special tail, remainder to her in fee, upon condition that if he paid 50*l.* at a day certain to the daughter that the wife had, then the whole surrender should be void. The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration, without notice. It was resolved, that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand: he had chosen the latter, and the plea was allowed.

Cases of Conditional Purchases.

38. A distinction has been likewise made between mortgages and defeasible conditional purchases, subject to be repurchased within a time limited, where the interest is taken by way of rent-charge. For in the latter cases the stipulations made between the parties must be strictly adhered to, or else the estate of the grantee will become absolute.

Floyer v. Levington, 1 P. Wms. 268.

39. J. S. granted a rent-charge of 48*l.* a year in fee to B. upon condition that if J. S. should at any time give notice to pay in the consideration money, being 800*l.* by instalments, namely, 100*l.* at the end of every six months, and should, pursuant to such

notice, pay the same and interest, at any time during his life, then the grant to be void. There was no covenant for J. S. to pay the money, and the rent-charge was much less than what the interest came to. B. had conveyed it over after J. S.'s death to a purchaser, with a collateral security for quiet enjoyment, and the purchaser had afterwards made a marriage settlement upon it. The question was, whether it was redeemable after sixty years. It was decreed by Lord Cowper that it was not. He observed, it was material, that at the time of making the mortgage, interest was at 8 *per cent.*; the rent-charge, therefore, was much less than the interest of the money, consequently the payment of the rent-charge could not be taken as the payment of the interest: That several circumstances concurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it: That the mortgagee seemed to have allowed a consideration for purchasing the equity of redemption, after the death of the mortgagor, 1. By taking the rent of 48*l. per annum*; 2. By agreeing to have his money by instalments; 3. By leaving it only at the election of the mortgagor, whether he would redeem or not: That there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased. Length of time, where so great as in this case, was a good bar of redemption of a rent-charge, as well as of land; and the mortgagor was not bound to pay the money by any covenant.

The reporter observes, that from the turn of Lord Cowper's argument, length of time seemed to be his principal objection to the redemption. But in the following case, decided by Lord Hardwicke, upon an

appeal from the Rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, is confirmed.

Mellor v. Lees, 2 Atk. 494.

40. A mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead. Afterwards, on the 5th of June of the same year, the Whiteheads mortgaged the same estate to Cartwright and Haywood, and their heirs, for securing 200 *l.*; to which Thomas Mellor and his son John were parties. Cartwright and Haywood, in order to secure themselves the interest, made a lease to the plaintiff's father and to his assigns, dated 12th June 1689, for 5000 years, at the rate of 12 *l.* a year for the first three years, and 10 *l.* a year for the remainder of the term; and if in the space of three years the 200 *l.* was not paid with interest, then the premises were to be reconveyed. Receipts had been given, sometimes for interest, and sometimes for a rent-charge. The last receipt was in 1730. The 200 *l.* was money lent under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee in Lancashire or Cheshire; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate at the time of the mortgage was worth 500 *l.* only, but was then valued at 900 *l.* The plaintiff, on the 20th January 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. It was so decreed by Mr. Fortescue, Master of the Rolls. Upon an appeal to Lord Hardwicke, he said the bill was properly dismissed, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to Floyer v. Levington.

41. King James I., by his letters patent under the great seal, granted divers lands to John King and John Bingley, and their assigns, for 116 years, at a certain yearly rent. The residue of this term became vested in John Tasburg. King Charles I., by letters patent, granted the same premises to Sir Maurice Eustace and his heirs, at a like rent, but without reciting or taking any notice of the term of 116 years. Sir Maurice, by his will, devised the premises *inter alia* to his nephew, Sir John Eustace, in fee. The premises being only of the clear yearly value of 200*l.* Sir John Eustace, in consideration of 200*l.* paid him by John Tasburg, by lease and release, in May 1681, conveyed the same to Charles Tasburg and his heirs, in trust for John Tasburg. In the release there was a proviso to the following effect, *viz.* that if Sir John Eustace, his heirs, executors or administrators, should pay to Charles Tasburg, his executors, administrators, or assigns, at the end of five years, the sum of 200*l.*, with full interest for the same, at 10 *per cent.*, according to the custom of Ireland, then it should be lawful to him and his heirs to re-enter, and the same to repossess and enjoy as in his former right. But if Sir John, his heirs, executors or administrators, should fail in payment of the money with interest, at the time limited, then the estate of the said Charles Tasburg should be absolute and indefeasible, as well in equity as in law: that Sir John, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said release; and Sir John did thereby, for himself and his heirs, release unto Charles Tasburg, his heirs and assigns, for ever, all his right, in equity to redeem the premises, in case of failure of payment as aforesaid. There was no

Tasburg v. Echlin, 2 Bro. Par. Ca. 265.

covenant in the deed on the part of the grantor to repay the 200*l.*, or the interest thereof, as is usual in mortgages.

The five years mentioned in the proviso being elapsed, and no part of the 200*l.* or the interest having been paid, John Tasburg, having no remedy at law to compel the payment, the estate being only a reversion expectant upon the determination of a term, of which there were then 43 years unexpired, exhibited a bill against Sir John Eustace in the Court of Chancery of Ireland, in the name of Charles Tasburg, setting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional estate of Charles Tasburg in the premises, in case it should be adjudged to be a defeasible or redeemable estate, should be made absolute to him and his heirs: in that case, that Sir John Eustace might be foreclosed of all right or equity of redemption of the premises, and might make farther absolute conveyances and assurances to the said Charles Tasburg, according to the tenor and true meaning of the indentures of lease and release. Sir John being served with a subpœna to answer this bill, stood out all process of contempt to a sequestration; and never having put in his answer, a decree was made that he should be foreclosed, unless the principal, interest, and costs were paid on the 11th December 1689. Sir John Eustace lived till the year 1706, when he died without issue; and never took any step to impeach the decree, or to seek redemption, but acquiesced under it for 18 years.

Henry Tasburg succeeded to this estate on the death of his father John in 1691, and entered thereupon; but the value of lands in Ireland having risen considerably, a bill was exhibited in the Court of

Chancery there, in 1723, by the co-heirs of Sir John Eustace, alleging that the decree of foreclosure was obtained by surprise, fraud, and imposition, and praying it might be reversed.

Henry Tasburg put in a plea and an answer to this bill, insisting on his title, pleading the lease and release in 1681, the decree of foreclosure, the great length of time, and acquiescence under the decree.

It was decreed, that upon the plaintiffs paying the principal, interest, and costs due, they should recover the lands.

Upon an appeal, in 1733, to the House of Lords of England, it was insisted on behalf of Tasburg, that there ought to be no redemption upon any terms whatever, it being expressly agreed by the release, that if the money was not paid within five years, the estate should be irredeemable. It ought, therefore, to be considered as a conditional purchase, and the rather, because there was no covenant on the part of Sir John Eustace to pay the money: That as the appellant Tasburg, or those under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage; for in cases of mortgages the remedy should be reciprocal, consequently no equity of redemption could arise or spring from the condition contained in the release; for the supposed pledge was only a reversion expectant on a long term for years, whereof no less than 43 were then to come, during which time it could yield no manner of fruit or profit; and, in reality, the 200*l.* was more than sufficient consideration for the absolute purchase of the reversion, as lands were usually sold in Ireland at that time, and for near 20 years after: That the decree of 1688 ought to be binding on Sir John Eustace, and upon the respondents, as deriving under

him; and ought not, at such a distance of time, to be impeached or altered.

On behalf of the respondents it was said, that the nature of the transaction, and the very deeds themselves, evidently shewed that they were originally intended as a mortgage, not as a purchase. It was plain that John Tasburg understood them so to be, by bringing his bill of foreclosure. That courts of equity had, on all occasions, relieved against restraints imposed upon the equity of redemption; had admitted the mortgagor to redeem, notwithstanding the expiration of the time limited by the parties for that purpose; and had always considered clauses of this nature as terms extorted from the necessities of the borrower, tending to usury and oppression. Nor could any case be more proper for relief than this, where the redeemable interest did not commence in possession till 1724, and where the mortgagee was attempting to gain an estate of 900*l. per annum* for so small a consideration as 200*l.* The decree was reversed.

A Power of Sale may be given.

42. A power may be given to a mortgagee, in case the money borrowed be not paid at the time stipulated, to sell the estate absolutely.

Croft v. Powell, Com. R. 603.

43. A conveyance of lands was made by lease and release by A. to B. and his heirs: by a defeazance, bearing date with the release, it was agreed, that if A. repaid 1000*l.*, &c. borrowed of B., and two other sums borrowed of other persons, which B. had taken upon himself to pay off within a year, then B. should reconvey to him: if he failed to pay the money within the year, then B. should mortgage or absolutely sell the lands, free from redemption; and out of the money raised by such mortgage or sale, pay the said 1000*l.* &c. with interest, and be accountable for the overplus to A. and his heirs. The money not

being paid at the time stipulated, B. agreed to convey the estate for a certain sum of money. In the agreement, and also in the conveyance, an exception was made, in which the defeazance was mentioned.

The court said, the mortgagor might have redeemed at any time, while the estate continued in B.; and though B. had a power, on non-payment within the year, to mortgage or sell, in order to raise the money lent, and to be accountable for the overplus, it was not then to be considered what *he might have done*, but what he had done. It was evident that it was not B.'s intention to convey an absolute and indefeasible estate, for he had not conveyed it absolutely, and free from the equity of redemption, but had insisted upon having the defeazance inserted.

It is clear, from the above statement, that the court admitted the validity of the power of sale; and the same doctrine was fully assented to in the following case.

44. A mortgage of leaseholds was made to a trustee in 1798, with the usual power of redemption. It was agreed, that if default should be made in payment of the money, the trustee might sell the estate, pay off the mortgage money, and give the residue to the mortgagor. Default was made in payment of the money. The trustee sold the estate by public auction. The purchaser required the concurrence of the mortgagor, who refused to join, insisting that the sale was made without his consent, and at an undervalue; upon which the purchaser filed a bill against the trustee and the mortgagor, who afterwards becoming a bankrupt, he filed a supplemental bill against his assignees. Upon the hearing of the cause, the court dismissed the bill as against the mortgagor and his assignees, with costs; and decreed a specific performance against the trustee and his *cestui que* trust.

Clay v. Sharpe, Lib. Reg. Mich. 1802. fo. 66.

TITLE XV.

MORTGAGE.

CHAP. II.

Of the several Interests of the Mortgagor and Mortgagee.

1. *The Mortgagor is Quasi Tenant at Will.*
4. *Cannot commit Waste.*
5. *Nor make a Lease binding on the Mortgagee.*
9. *Nor bar the Mortgagee by Fine.*
10. *After Forfeiture has an Equity of Redemption.*
11. *The Mortgagee has the legal Estate.*
12. *Entitled to Rent after Notice.*
14. *Not subject to Covenants till Entry.*
16. *Cannot commit Waste.*
19. *Nor make Leases.*
21. *Nor present to a Living.*
22. *Nor bar the Mortgagor by Fine.*
23. *A Renewal of a Lease will be a Trust for the Mortgagor.*
24. *Must account for the Profits.*
33. *An Assignee only entitled to what is really due.*
35. *A Mortgage is Personal Estate.*
38. *Unless the Intention be otherwise.*
41. *But the Land must be reconveyed.*

SECTION 1.

The Mortgagor is Quasi Tenant at Will.

UPON the execution of the conveyance by which a mortgage is created, the legal freehold and inheritance, or the legal estate for the term of years created by the mortgage, becomes immediately vested in the mortgagee. As, however, the actual occupation and possession of the lands is scarce ever given to the mortgagee, but, on the contrary, a clause is usually inserted in the mortgage deed, that until default is made in payment of the mortgage money, or of the interest, the mortgagor shall retain the possession and receive the rents; he becomes in many respects tenant at will to the mortgagee. And it is said, that where there is a proviso that the

Powesley v. Blackman, Cro. Ja. 659.

mortgagor shall continue in possession for the number of years given for the repayment of the mortgage money, he will then be tenant for years.

2. It was formerly doubted whether an assignment by a mortgagee alone did not operate so as to make the mortgagor's continuing in possession, under the above clause, a disseisin or divesting of the term, and turn it to a right; for if it did, the assignee could not assign it over, without making an entry, or obtaining the concurrence of the mortgagor. But it was held by Lord Holt that the mortgagor's continuing in possession would not have this effect. And Chief Justice Eyre said, that the covenant to suffer the mortgagor to continue in possession governed all the subsequent assignments. For that covenant being that the mortgagor should hold till default of payment, it created a tenancy at will upon all the mesne assignments.

Smartle v. Williams, 1 Salk. 345.

Comb. 249.

3. The doctrine that the mortgagor is tenant at will to the mortgagee, has been discussed in some modern cases, in which it is shewn that though some of the qualities of a tenancy at will subsist between a mortgagor and mortgagee, yet in others they differ. For it is now established that a mortgagee may by ejectment, without six months notice, recover against the mortgagor, or his tenant; in which respect, the estate of a mortgagor is inferior to that of a tenant at will.

Doug. R. 279. 1 Term Rep. 378—382.

Tit. 9. c. 1.

4. A mortgagor in possession cannot commit waste: if he does, the Court of Chancery will grant an injunction against him; because it is not just or equitable that a mortgagor should prejudice or diminish the security of the mortgagee.

Cannot commit Waste.

3 Atk. 723.

5. A mortgagor in possession cannot make a lease to bind the mortgagee: 1. Because, being only *quasi*

Nor make a lease binding on the Mortgagee.

tenant at will, a lease made by him would operate as a determination of his will. 2. Because the mortgagor can do no act tending to diminish the security; so that where a mortgagor makes a lease, the mortgagee may consider the lessee as a trespasser; and is not under the necessity of giving him six months notice to quit.

Keech v. Hall, Doug. 21.

6. An ejectment was brought for a warehouse in the City of London, by a mortgagee, against a lessee under a lease in writing, for seven years; made by the mortgagor, after the date of the mortgage. The lease was at rack-rent; the mortgagee had no notice of the lease, nor the lessee of the mortgage. *Lord* Mansfield said, the question for the court to decide was, whether by the agreement understood between mortgagors and mortgagees—which was, that the latter should receive interest, and the former keep possession—the mortgagee had given an implied authority to let from year to year at a rack-rent; or whether he might not treat the defendant as a trespasser, disseisor, or wrong doer. No case had been cited where the question had been agitated, much less decided. Where the lease was not a beneficial one, it was for the interest of the mortgagee to continue the tenant; and where it was, the tenant might put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question might be more proper for a court of equity went upon a mistake: it emphatically belonged to a court of law, in opposition to a court of equity: for a lessee at a rack-rent was a purchaser for a valuable consideration; and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration the court was clearly of opinion that there was no inference of fraud or

consent against the mortgagee, to prevent him from considering the lessee as a wrong doer. It was rightly admitted, that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turned upon the agreement between the mortgagor and mortgagee. When the mortgagor was left in possession, the true inference to be drawn was an agreement that he should possess the premises at will, in the strictest sense, and therefore no notice was ever given him to quit; and he was not even entitled to reap the crop, as other tenants at will were, because all was liable to the debt, on payment of which the mortgagee's title ceased. The mortgagor had no power, expressed or implied, to let leases, not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent—to leases where a fine was taken on a renewal for lives. The tenant stood exactly in the situation of the mortgagor. The possession of the mortgagor could not be considered as holding out a false appearance; it did not induce a belief that there was no mortgage, for it was the nature of the transaction that the mortgagor should continue in possession. Whoever wanted to be secure when he took a lease, should inquire after and examine the title deeds. In practice indeed, especially in great estates, that was not often done, because the tenant relied on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule was, *qui prior in tempore potior est in jure.* If one must suffer, it was he who had not used due diligence in looking into the title. Judgement was given for the plaintiff.

7. In a subsequent case it was resolved that an ejectment might be brought by the assignee of a

Thunder v. Belcher, 3 East. 449.

mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year, by the mortgagor, after the mortgage made to the original mortgagee, but before assignment of it to the plaintiff's lessor.

8. It should however be observed that a lease of this kind is good against the mortgagor and his heirs, and also against all strangers; and will entitle the lessee to redeem the mortgage.

Nor bar the Mortgagee by Fine.

9. A mortgagor in possession cannot bar the mortgagee by a fine and non-claim, of which the reason will be given in Title XXXV. *Fine*, Ch. xiv.

After Forfeiture has an Equity of Redemption.

10. Where the money is not paid on the day specified in the deed, the mortgage is forfeited at law; and the estate of the mortgagor becomes an equity of redemption; of which an account will be given in the next chapter.

The Mortgagee has the legal Estate.

11. It has been stated that, upon the execution of a mortgage deed, the mortgagee becomes seised of the legal estate, and may enter into possession, unless prevented by the express terms of the contract. But in equity the lands mortgaged are considered as a pledge only in his hands, for securing the repayment of the money borrowed. And as long as the right of redemption exists, the mortgagee is considered merely as a trustee for the mortgagor; so that none of his charges or incumbrances attach on the estate.

ante, c. 1. § 10.

12. Where the interest is not paid, the mortgagee becomes entitled to the possession of the lands, and may bring an ejectment for the recovery of them. But by the statute 7 Geo. II. c. 20. it is enacted that where an ejectment is brought by a mortgagee, and no suit is then depending in equity respecting the foreclosure or redemption of the mortgage, the mortgagor's tendering the principal, interest, and costs in

court, shall be deemed a full satisfaction; and the court may compel the mortgagee to reconvey the premises.

Entitled to Rent after Notice.

12. The mortgagee may upon nonpayment of the interest, give notice of the mortgage to the tenant in possession, and thereby acquires a right to the rent then in arrear, as well as to what accrues afterwards.

Moss v. Gallimore, Doug. 279. 1 Term R. 384.

13. One Harrison, being seised in fee, demised certain lands in 1772 to Moss the plaintiff for 20 years, reserving rent, and afterwards mortgaged the same lands to the defendant Gallimore in fee. Moss continued in possession from the date of his lease, and paid his rent regularly to the mortgagor, all but 28 *l.*, which was due on or before November 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January 1779, the mortgagee gave notice to Moss the tenant of the mortgage, and demanded the rent then due, and afterwards entered and distrained for rent. The question was, whether the distress could be justified.

Lord Mansfield.—"I think this case, in its consequences, very material. It is the case of lands let for years, and afterwards mortgaged; and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years, the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb the possession, but only requires the rent to be paid him, and not to the mortgagor. This, however is entangled with difficulties. The question here is, whether the mortgagee was, or was not, entitled

to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; but there is a provision, that the tenant shall not be prejudiced by any act done by him as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection, he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and here, the tenant has suffered no injury. No rent has been demanded, which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arms-length. In the case of executions, it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving the indemnity. As between the assignees and the mortgagee, let us see who is entitled to rent. The assignees stand exactly in the case of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this

agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damnified, for the mortgagor can never oblige him to pay over again the rent which has been levied by distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor."

Not subject to Covenants till Entry. Tit. 32. c. 25.

14. It is a principle of law, that an assignee of a lease is subject to the performance of all the covenants contained in such lease. So that where a lease is assigned by way of mortgage, the mortgagee would become liable to the covenants, unless a distinction were made between an absolute assignment, and one made by way of mortgage. Upon this ground it has been established, that if a leasehold is assigned as a security only for the repayment of money, the lessor cannot sue the mortgagee, as assignee of all the mortgagor's estate, even after the mortgage has been forfeited, unless the mortgagee has entered into possession.

Eaton v. Jacques, Doug. 457.

15. Eaton the plaintiff demised the premises in question to Denis for 21 years, rendering rent. Some time after, Denis assigned this lease, and all his estate, right, title, and interest therein, to Jacques, subject, nevertheless, to the rents and covenants therein contained, with a proviso for making this assignment void, on payment of a sum of money and interest. The rent being in arrear, Eaton the lessor brought an action of debt for the rent, against Jacques the mortgagee of the term; and the question was, whether the plaintiff was entitled to recover.

Lord Mansfield—"In point of fact, this case must have existed for a century past, in a thousand instances; in this great town, particularly, building

leases have been, and are perpetually mortgaged; and yet no instance has been found, where the ground landlord has attempted to charge the mortgagee, not in possession, with the rent or covenants.

"This is a strong argument against the plaintiff, especially where the case is so hard, so unjust, and so unconscionable. Numberless inconveniences would arise, if such a demand could be supported. The mortgagee never asks whether the rent is paid; he only looks to his security; and, when the principal and interest are paid, he re-assigns.

"But, if the plaintiff is right, a mortgagee might be called upon, years after such re-assignment, for arrears, or breaches of covenant, during the assignment. The consequences would be terrible. And all this arises from a mere slip in the attorney, in making the conveyance; for, if he had made it an underlease, by leaving a reversion of a day in the mortgagor, the landlord would have had no pretext to call upon the mortgagee. Though no cases have been cited at the bar, which apply to the present question, we have found two in Vernon, which I will state, that it may not be supposed, after this judgement, that they were overlooked. The first is
2 Vern. 275. the case of Sparkes v. Smith. A bill having been filed against the mortgagee of a term to compel him to discover whether the lease had not been assigned to him, and to perform the covenants, the court said, that as the defendant was only a mortgagee, and never had been in possession, they would not assist the plaintiff to charge him, or desire him to perform the
Id. 374. covenants. The other case is that of Pilkington v. Shaller, which certainly cannot be supported; for the court, there, refused to relieve the mortgagee, because it was his own fault to take an assignment of the whole

term, and not an underlease; but that is a very common ground of relief in equity. These cases, therefore, leave the question as it stood upon the argument at the bar; and there being no solemn well-considered decision, we must resort to principles. In leases, the lessee, being a party to the original contract, continues always liable, notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burden while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice between men, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instrument between the parties? The lessor is a stranger to it. He shall not be injured; but he is not entitled to any benefit under it. Can we shut our eyes, and say it was an absolute conveyance? It was a mere security; and it was not, nor ever is meant, that possession should be taken, till default of payment, and till the money has been demanded. The legal forfeiture has only accrued six months; and if the mortgagee had wanted possession, he could not have entered *viâ facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law. It was not an assignment of all the mortgagor's estate, right, title," &c.

Webb v. Russell, 3 Term. 393.

16. Although a mortgagee in fee in possession has a right, at law, to commit any kind of waste, because he is there considered as the absolute owner of the inheritance; yet he will be restrained in equity. And the Court of Chancery will also decree an account to be taken of the trees cut down; and direct the produce to be applied, first in payment of the interest

Cannot commit Waste.

2 Vern. 392.

due on the mortgage, and then in sinking the principal.

Sel. Ca. in Chan. 30.

17. If however the security is defective, the Court of Chancery will not restrain a mortgagee from his legal privileges. But the money arising from the sale of timber must be applied towards payment of the mortgage.

Hardy v. Reeves, 4 Ves. Jun., 480.

18. A mortgagee of a copyhold may pull down ruinous houses, and build better ones, to prevent a forfeiture. For the lord has a right to say that the tenant shall not let the houses fall, and may seize if he does.

Nor make Leases.

19. A mortgagee in possession cannot make a lease of the lands, so as to bind the mortgagor, without an absolute necessity; for by that means the estate might be greatly injured, by the mortgagee's granting improper or beneficial leases.

Hungerford v. Clay, 9 Mod. 1.

20. The plaintiff having mortgaged a house in London to Clay the defendant, tendered him the principal sum due and interest, which he refusing, exhibited his bill to have a reconveyance. The defendant answered, that he had made a lease of the house for five years, reserving so much yearly rent, with a covenant, that after the expiration of the five years, the lessee should hold it for four years longer; and that if the plaintiff, the mortgagor, would grant such lease, the defendant would reconvey.

The Master of the Rolls decreed for the defendant. On an appeal to Lord Macclesfield, it was insisted for the plaintiff, that a mortgagee could not make a lease of a house or lands in mortgage, unless there was an absolute necessity for it, which did not appear in this case. The court, being of that opinion, reversed the decree.

21. A mortgagee of a manor, to which an advowson is appendant, or of an advowson in gross, cannot, in the case of a vacancy, present to the living; of which the reason will be given in Title XXI. *Advowson.* Nor present to a Living.

22. A fine levied by a mortgagee in possession of the mortgaged estate will not bar the mortgagor or his heirs; of which the reason will be given in Title XXXV. *Fine*, Ch. xiv. Nor bar the Mortgagor by Fine.

23. Where a mortgagee in possession of a lease for lives or years renews it, he will be considered as a trustee for the mortgagor; who will be entitled to such new lease, on payment of the money borrowed; because such renewal is supposed to be obtained in consequence of the possession of the original lease. But in cases of this kind the mortgagee will be allowed to add the fines paid for renewal to his principal, and to receive interest upon them. A Renewal of a Lease will be a Trust for the Mortgagor. Tit. 12. c. 1. Sel. Ca. in Chan. 55. Manlove v. Ball, 2 Vern. 84.

24. Where the mortgagee is put into possession of the lands, or where he enters after forfeiture, he becomes a bailiff or steward to the mortgagor; and is therefore subject to account with him for the rents and profits of the estate. He is not, however, obliged to account according to the value of the lands; that is, he is not bound by any proof that the land is worth so much, unless it can likewise be proved that he made so much of it, or might have done so, had it not been for his own wilful default, as if he turned out a sufficient tenant, who held it at so much rent, or refused to accept a sufficient tenant, who would have given so much for it. Because it is the laches of the mortgagor that he lets the land lapse into the hands of the mortgagee, by the nonpayment of the money; therefore when the mortgagee enters, he is only accountable for what he actually receives, and is Must account for the Profits. 1 Vern. 45. 476. 2 Atk. 534.

not bound to take the trouble of making the most of another's property.

Sel. Ca. in Chan. 63.

25. If the mortgagor proves that the estate was let at a certain price, while in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unless the mortgagee shews the contrary.

1 Vern. 270.

26. If a mortgagee enters upon the estate mortgaged, and thereby keeps out other creditors, and yet allows the mortgagor to receive the rents and profits; he will be charged with all the profits which he might have made after entry.

27. Where a mortgagee permits the mortgagor to make use of his incumbrance in keeping out other creditors, he will be subject to account for the profits, from the time when the creditors were entitled to their remedy.

Chapman v. Tanner, 1 Vern. 267.

28. A person made a mortgage of his estate, and afterwards became a bankrupt. The assignees brought an ejectment for the recovery of the lands comprised in the mortgage. The mortgagee refused to enter, but suffered the bankrupt to fence against the assignees, with this mortgage.

The Lord Keeper said, the mortgagee should be charged with the profits, from the time when the ejectment was delivered.

1 Ab. Eq. 328.

29. If a mortgagee in possession assigns over his mortgage, without the assent of the mortgagor, he is bound to answer for the profits, both before and after the assignment; though assigned only for his own debt: For he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to an insolvent person.

3 Atk. 518.

30. A mortgagee will not be allowed any thing for his trouble in receiving the rents of the estate

himself; but if he is obliged to employ a bailiff or agent, he will be allowed what he has paid to him. And although there be a private agreement between the mortgagor and mortgagee, for an allowance to the mortgagee for his trouble in receiving the rents of the estate, yet the Court of Chancery will not carry it into execution; for they will not suffer him to receive more than his principal and interest. 2 Atk. 120. 10 Ves. 405.

31. A mortgagee in possession will be entitled to such expences as he is put to in keeping the estate in necessary repair, which he may add to the principal of his debt, with interest; and if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may add this to the principal of his debt, and it shall carry interest. 3 Atk. 518.

32. It is a rule of the Court of Chancery, in directing an account between a mortgagor and mortgagee, that wherever the gross sum received exceeds the interest, it shall be applied to sink the principal. "But this (says Lord Hardwicke) is often attended with great hardships to the mortgagees, where, as in this case, the sum was large; 4,000*l.* principal, and the mortgagee forced to enter upon the estate, and could only satisfy his debt by parcels, and is a bailiff to the mortgagor, without salary, subject to account: And therefore truly said the Master, he is not obliged, for every trifling small exceed of interest, to apply it to sink the principal; nor do I know that the court has ever laid it down as an invariable rule, that the Master must always, in taking such accounts, make annual rests." 2 Atk. 534.

33. A mortgagee, either before or after he enters into possession, may assign over his mortgage. But in all such cases the assignee is only entitled to what is really due on the mortgage at the time of the assign- An Assignee only entitled to what is really due.

Mathews v. Walwyn, 4 Ves. Jun. 118.

ment; not to what may appear due on the face of the mortgage. It is therefore the universal practice to make the mortgagor a party to the assignment; for otherwise it may happen that the mortgagee having received a part of the money, assigns the mortgage, in consideration of the whole sum for which it was originally made: in which case the assignee would be defrauded; as he could only oblige the mortgagor to pay him what remained due.

Williams v. Sorrell, 4 Ves. Jun. 389.

34. It was held in a subsequent case, that even after an assignment of a mortgage, payments to the mortgagee without notice must be allowed by the assignee; though the assignment of the mortgage (the lands being in Middlesex) was registered.

A Mortgage is Personal Estate.

Treat. of Eq. B. 3. c. 1. § 13.

35. Although the mortgagee enters into possession, yet as long as the right of redemption exists, the mortgage is only considered as personal estate, the debt being the principal, and the land the accessory; and if the mortgagor does not redeem, the personal representatives of the mortgagee will be entitled to the land.

Ellis v. Guavas, 2 Chan. Ca. 50.

36. A mortgage was forfeited, the heir of the mortgagee was in possession, and no want of assets; but as the mortgage money was part of the personal estate, the heir was decreed to convey the lands to the administrator of the mortgagee.

Att. Gen. v. Bowyer, 5 Ves. 300.

37. In a modern case it was resolved that lands held originally under old mortgages passed by a general devise, though no release of the equity of redemption appeared, and that there was no equity between the heir or devisee and the personal representative, to convert property from the state in which it is found, at the death of the testator.

Unless the Intention be otherwise.

38. If however it appear to have been the intention of the mortgagee that it should go as real estate, the personal representatives will not be entitled to it,

39. A testator having a mortgage in fee devised it to his two daughters and their heirs. One of the daughters dying without issue, her husband and administrator claimed a moiety of the lands, as part of his wife's personal estate; it being a mortgage not foreclosed, nor the equity of redemption released. Noys v. Mordaunt, 2 Vern. 581.

The court said, that although it was a mortgage as between the mortgagor and mortgagee, yet it being the testator's intention that it should pass as real estate, it must go to the deceased daughter's heir at law.

40. Mr. Garret being indebted to his brother, devised to him a mortgage for a larger sum, for which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed. Garret v. Evers. Mos. Rep. 364.

Lord King declared that the lands in mortgage, being devised as real estate, should be considered as such, between the devisor and devisee; therefore though the legacy was greater than the debt, it should not go in satisfaction of it; but if assets fell short, it was still to be considered as personal estate, for the payment of debts.

41. It is said by Lord Mansfield, that "a mortgage is a charge upon land; and whatever would give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts, it will go to executors, it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, though the debt were forgiven only by parol: for the right to the land would follow, notwithstanding the statute of frauds." But the Land must be reconveyed, 2 Burr. 978.

42. This passage can only mean that mortgages are so far out of the statute of frauds, that the payment of the debt converts the mortgagee into a trustee for the mortgagor; who, by an application to the Court of Chancery, may obtain a decree to compel the mortgagee to reconvey or assign the lands by proper assurances; not that the payment of the money shall, of itself, have the effect of restoring the legal estate to the mortgagor, without any conveyance.

43. In the case of a mortgage in fee, the proviso in all modern deeds is, that upon payment of the money at the time specified, the mortgagor shall reconvey the estate. Now, in this case, even a strict performance of the condition will not operate so as to revest the legal estate in the mortgagor, without a reconveyance; and where the condition is not strictly performed, the case is much stronger.

Where the mortgage is made by a demise for years, the proviso is, that if the money be paid at the time specified, the term shall cease. And it is agreed that where the money is not paid at the time specified, the term becomes absolute, and must be surrendered or assigned.

In the case of antient mortgages a court of justice might presume a reconveyance of the legal estate: But this presumption admits the necessity of such reconveyance.

Tit. 12. c. 2.

TITLE XV.

MORTGAGE.

CHAPTER III.

Of an Equity of Redemption.

1. *Nature of.*
3. *May be lost by Fraud.*
5. *Similar to a Trust Estate.*
8. *Is alienable, devisable, and descendible.*
9. *May be mortgaged.*
10. *Subject to Curtesy.*
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16. *Is Assets in Equity.*
21. *And sometimes legal Assets.*
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26. *A subsequent Incumbrancer.*
27. *A Dowress, Jointress, and Tenant by the Curtesy.*
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34. *Whoever redeems must do Equity.*
55. *No precise Time is fixed for Redemption.*
56. *But 20 Years Possession is a Bar.*
62. *Exceptions,* 1° *Where there is a Disability.*
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77. 4° *Where no Time is appointed for Payment.*
84. 5° *Where the Mortgagor continues in Possession.*
86. 6° *Where there is Fraud in the Mortgagee.*

Section 1.

Nature of.

WE have seen that when the money borrowed on mortgage is not paid at the time specified, the mortgage becomes forfeited at law, and the legal estate absolutely vested in the mortgagee. But still the Court of Chancery allows the mortgagor a reasonable time to redeem, on payment of the principal, interest, and costs; which is called an equity of redemption.

2. An equity of redemption is a mere creature of a court of equity, founded on this principle, that as

a mortgage is nothing more than a pledge for securing the repayment of a sum of money to the mortgagee, it is but natural justice to consider the ownership of the land as still vested in the mortgagor, subject only to the legal title of the mortgagee; so far as such legal title is necessary to his security.

May be lost by Fraud.

3. By the statute 4 William & Mary, c. 16. it is enacted, That if any person shall borrow money, &c. or become indebted for any other valuable consideration, and for the payment thereof shall voluntarily give a judgement, statute, or recognizance, and shall afterwards borrow any other sum of money, or for any other valuable consideration become indebted to such other, and for securing the repayment and discharge thereof shall mortgage lands to the second lender, or to any other person in trust for him, and shall not give notice to the mortgagee of such judgement, &c. in writing before the execution of the said mortgage or mortgages, such mortgagor shall have no benefit in the equity of redemption of the lands mortgaged, unless such mortgagor or his heirs, upon notice given by the mortgagee in writing, under his hand and seal, attested by two witnesses, of such former judgement, &c. shall within six months pay off and discharge the same, and cause the same to be vacated and discharged; and if any person who shall once mortgage lands for a valuable consideration, shall again mortgage the same lands, or any part thereof, to any person, the former mortgage being in force, and shall not discover in writing to the second mortgagee the first mortgage, such mortgagor shall have no relief, or equity of redemption, against the second mortgagee.

Provided that this act shall not extend to bar any widow of any mortgagor of her dower, who did not

legally join with such husband in such mortgage, or otherwise lawfully exclude herself.

4. It has been determined on the construction of this statute, 1. That if a mortgage becomes irredeemable by this statute, it will remain so in the hands of an assignee, though assigned in consideration of the principal, interest, and costs due thereon. 2. That if a subsequent mortgagee redeem such a mortgage, he shall hold the estate irredeemable. 3. That if there are more lands in the second mortgage than in the first, that seems to be a case omitted out of the statute. But the adding an acre or two shall not exempt it; for that may be a contrivance to evade the statute. Stafford v. Selby, 2 Vern. 589.

5. An equity of redemption is considered as similar in some respects to a trust estate; for the mortgagee is entitled to, and holds the lands, merely as a pledge for securing the repayment of his money; and, in most other respects, is a trustee for the mortgagor. Similar to a Trust Estate.

6. Lord Hale says, there is a diversity between a trust and a power of redemption. For a trust is created by the contract of the party, and he may direct it as he pleases. Therefore one that comes in, in the *post*, shall not be liable to it, without express mention made by the party. But a power of redemption is an equitable right, inherent in the land, and bound all persons, in the *post*, or otherwise; because it was an antient right to which the party was entitled in equity. Hard. 469. 17 Ves. 133.

7. While the mortgagor is allowed to retain the possession of the estate, after forfeiture, he is in the same situation *quoad* the mortgagee as he was before the mortgage was forfeited. But *quoad* strangers his possession, both before and after forfeiture, has always been considered as similar to that of a *cestui que* trust,

and attended with the same consequences in equity as a seisin in deed of a legal estate at law. And Lord Hardwicke has laid it down, that a person entitled to an equity of redemption, who is in the receipt of the rents and profits, has such a seisin and possession of the equitable estate in the land, as, in the consideration of a court of equity, is equivalent to an actual seisin of a legal estate in a court of law.

Cashborn v. Scarf, infra. § 11.

Is alienable, devisable, and descendible.

8. It follows that an equity of redemption may be aliened, entailed, and devised by will, in the same manner as a trust estate. It is also descendible to the heir of the mortgagor; there may be a *possessio fratris* of it, and it will follow the custom, as to the legal estate. For if lands held in borough English are mortgaged, the equity of redemption will descend to the youngest son, to whom the legal estate would have descended. So, in a mortgage of lands held in gavelkind, the equity of redemptioh will descend to all the sons.

Tit. 29. c. 5.

May be mortgaged.

9. An equity of redemption may be mortgaged. But a mortgage of this kind, which is usually called a second mortgage, is seldom recommended by conveyancers, for two reasons. 1. Because a third mortgagee without notice may, by paying off the first mortgage, acquire a preference over the second. 2. Because great difficulties may arise in calling in the money; for as a second mortgagee has no legal remedy, he is driven to the tedious and expensive process of a suit in equity, to recover even his interest. There is however one case where a second mortgage may be accepted; that is, if he can get in a term for years prior to the first mortgage; for the acquisition of such a term will give the second mortgagee the legal estate.

Vide infra, c. 5.

10. An equity of redemption is subject to curtesy; so that where a man marries a woman who is entitled to an estate that is mortgaged, and has issue by her, he will be allowed in equity to hold it during his life, as tenant by the curtesy. Subject to Curtesy.

11. A woman being seised of certain lands, made a mortgage in fee of them for securing 900*l.* She afterwards married, and died without having paid off the mortgage, leaving issue a son. Her husband claimed to be entitled to the lands for his life, as tenant by the curtesy. Cashborne v. Inglis, 2Ab. Eq. 728. 1 Atk. 603.

The Master of the Rolls (Sir J. Jekyll) held he was not entitled.

On an appeal to Lord Hardwicke, he observed that the case depended on two considerations: 1. What kind of interest an equity of redemption was considered to be in a court of equity. 2. What was necessary to entitle a husband to be tenant by the curtesy.—As to the first, an equity of redemption had always been considered as an estate in the land; it was such an interest as would descend from the ancestor to the heir; it might be granted, entailed, devised, or mortgaged, and that equitable interest might be barred by a common recovery; which proved that an equity of redemption was not considered as a mere right, but such an estate, whereof, in consideration of equity, there might be a seisin; or a devise of it could not be good.

The person entitled to the equity of redemption was, in equity, considered as the owner of the land, the mortgagee only retaining it as a pledge or deposit; and for this reason it was, that a mortgage in fee was considered as personal estate, notwithstanding the legal estate vested in the heir of the mortgagee, in point of law. The husband of a mortgagee in fee

could never be tenant by the curtesy of the mortgaged estate, unless there was a foreclosure; or the mortgage had subsisted for so great a length of time, as the Court of Chancery thought sufficient, to induce it not to grant a redemption. As a mortgage in fee was only a *chose in action*, if the ownership of the land was not in the mortgagor, it was in nobody. An equity of redemption was no otherwise a right of action, than every trust; and as there could be no benefit had of an equity of redemption, but by *subpœna* out of chancery; so was the case of every mere trust out of land, which was considered as real estate in chancery, but could not be come at without a *subpœna*.

It was true a mortgagee was not barely a trustee for the mortgagor, but it was sufficient for the present purpose if he was in part a trustee for the mortgagor; and it was most certain that, as to the real estate in the land, the mortgagee was only a trustee for the mortgagor; for, until foreclosure, the mortgagee was only owner, as a charge or incumbrance, and entitled to hold as a pledge: as to the inheritance, and real estate in the land, the mortgagee was a trustee for the mortgagor, until the equity of redemption was foreclosed.

Secondly, what was requisite to entitle the husband to be tenant by the curtesy; four things, viz. marriage, issue, death of the wife, and seisin. It was admitted that the three first did concur; but the objection relied on was, that there was no actual seisin of the wife during the coverture; which was contended to be as necessary in respect to an equitable, as to a legal estate. The true question upon this point was, whether there was not such a seisin or possession in the wife, of the equitable estate in the

Tit. 5. c. 1.

land, as, in consideration of equity, was equivalent to an actual seisin of a legal estate, at common law: That, in the consideration of the Court of Chancery, he was of opinion, there was such a seisin of the wife in the present case, of the equity of redemption. He had shewn that a person entitled to the equity of redemption was owner of the land; if so, there must be a seisin of the estate; and what other seisin could there be than what the husband and wife had in the present case. For the wife was all along in possession until her death; and the mortgagee did not come into possession until after her death, nor was there any foreclosure. And though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it; and from thence it clearly followed that there could not be an higher seisin of an equitable estate.

That the husband might be tenant by the curtesy of this equitable estate, he cited Williams v. Wray, and Sweetapple v. Bindon, and observed that there had been two objections made: 1. That the husband had it in his power to have had seisin in his wife's lifetime, for he might have paid off the mortgage; therefore it was his own laches that he did not. 2. That a woman was not dowable of an equity of redemption. Tit. 5. c. 2.

As to laches in the husband, it was compared to his not making an entry at law; but the comparison would not hold, for it was not so easy to pay off the principal and interest due on a mortgage, as to make an entry at law; nor was it to be done so speedily, for a mortgagee was in most cases allowed six months notice to be paid. In the case of Sweetapple v. Bindon, the husband might have brought his bill in

his wife's lifetime, to compel the laying out the money in the purchase of lands; but though he omitted to do so till after his wife's death, yet that was not objected to him as laches.

As to the objection of a wife's not being endowed of an equity of redemption of a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proved too much; for it had been determined that a wife shall not be endowed of a trust estate, yet that a husband shall be tenant by the curtesy of it. That the argument from dower to curtesy failed in this case. Perhaps it would be hard to find a sufficient reason how it came to be so determined in one case, and not in the other; but that it was safe to follow former precedents, and what were settled and established: and if such precedents should be departed from, he held it fit rather that the wife should be allowed dower of a trust estate, and not that curtesy of a trust estate should be taken away. Decreed that the husband was entitled to curtesy.

But not to Dower.

12. A widow is not however allowed dower out of an equity of redemption of a mortgage in fee: upon the principle that an equity of redemption is analogous to a trust estate. And however severe this doctrine may seem, yet it has been solemnly confirmed in the following case.

Tit. 12. c. 2.

Dixon v. Saville, 1783. Powell Mort. V. 2. p. 37.

13. Abraham Dixon, being seised in fee of considerable estates, died in 1782 without issue, leaving Ann Dixon, the plaintiff, his widow, having devised his estates to trustees upon several trusts. Abraham Dixon not having in his lifetime made any settlement or other provision for his wife, in lieu or bar of dower, and she not having done any act to bar herself thereof, filed her bill against the trustees, stating the above

facts, claiming dower out of all the testator's real estate; and praying to be let into the receipt of one third part of the rents and profits thereof.

To this bill the trustees answered, that the testator had borrowed a large sum of money upon mortgage, and for securing the repayment thereof had, previous to his marriage with the plaintiff, conveyed the premises to the mortgagee in fee, subject to a proviso for redemption.

That the legal estate in the premises being, by this mortgage, absolutely vested in the mortgagee, previous to and at the time of the marriage of the testator with the plaintiff, and not being at any time afterwards reconveyed to him, but remaining vested in the mortgagee, at the time of his death; and he being therefore only entitled to the equity of redemption thereof, at the time of his marriage, and at all times thereafter, till the time of his death; the plaintiff was not at any time dowable in or out of the said premises, either at law or in equity.

On the hearing, the plaintiff could have proved by witnesses that the testator, her husband, understood and declared, that after his death his widow would be entitled to dower out of his real estates; that he made his will under that idea; and it could have been also proved, if relevant, by the person who drew it. Mr. Dixon having put the question to him, whether Mrs. Dixon would not be entitled to dower; to which he, being at that time ignorant of the mortgage, answered, that she certainly would. The will itself sufficiently spoke the idea; for the testator bequeathed to the plaintiff, by the name of his dear wife Ann Dixon, his coach and harness, and a pair of horses, together with as much of his plate as she should think proper, not exceeding the sum of 60*l.*; which

things she could have no occasion for, if she had not dower to support her.

The claim of the widow was supported on three grounds: 1st. The general law. 2dly. The distinction between a mere trust and an equity of redemption. 3dly. The authorities in favour of dower, under circumstances not more favourable than those attending this case.

Under the first of these heads it was observed, that dower was a right of the first attention and most sacred preservation at the common law. It was a right, not only founded in our law, but a right consonant to the first principles or laws of morality and equity, as springing from the moral obligation a man was under to make a provision for his wife. And accordingly it was in a variety of cases aided and extended beyond its strict legal limits, by the interposition of courts of equity, in removing trust terms, and other obstructions to it, in certain cases, which would stand in the way of it at common law. This proved it to be a right not merely confined to the common law, but a right recognized, protected, and aided in equity; and which, so far as it was the subject of relief in equity, was an equitable right. This was the predicament in which it stood in the cases of Dudley v. Dudley, Wray v. Williams, and the other cases in which it had been decided that a dowress should have the benefit of a trust term attendant on the inheritance, as against the heir.

Tit. 12. c. 3.

Considering it, therefore, as an equitable right, it well might be a wonder how it came about that a widow should not be entitled, against the heir, to dower of an equitable inheritance. Some, indeed, had confined the rule of her not being so to the cases where the trust was created by the husband

himself. This had been the opinion of the Master of the Rolls in Banks v. Sutton. However, this opinion had been overruled, and it seemed to be a settled point, that a widow was not dowable of a direct proper trust. Tit. 12. c. 2.

This naturally led to the second head of argument in favour of the widow; namely, the distinction between a mere trust, that was an use, as it was styled at common law, and an equity of redemption. The former was regarded at common law as quite a distinct interest from the legal estate, to which the right of dower was annexed. It of course did not involve in it that right: if it had, there would have been two opposite rights of dower in the same lands at the same time; as the widow of both the trustee and the *cestuique* trust would have been entitled to dower. For the widow of the trustee was clearly entitled at common law; and when the Court of Chancery interposed to prevent the legal title of the widow of the trustee, it seemed extraordinary that it did not, in its place, substitute an equitable one of the *cestuique* trust. However, these sorts of trusts being the creatures of the parties themselves, whatever were the legal incidents or privileges they wanted, might have been supposed to have been voluntarily relinquished and abandoned by the parties creating those trusts.

But it was otherwise with regard to an equity of redemption; that was not any interest created or reserved by or between the parties, beyond the express time of redemption; it was a mere creature of a court of equity itself, founded on this principle, that as a mortgage was originally nothing more than a pledge or security to the mortgagee for his money, it was but natural justice between man and man to

consider the original ownership of the lands as still residing in the morgtagor, subject to the legal title of the mortgagee, so far only as such legal title was requisite to the end of his security; and accordingly the title of the mortgagee was not treated by equity, as any thing beyond that point. His beneficial interest, though the mortgage was in fee, was considered only as personal estate; he was not permitted to grant leases, or exercise any other act of ownership, to the prejudice of the mortgagor, to whom he was even accountable for the profits of his estate: his widow was not permitted to claim dower, nor could he, or those claiming under him, avail themselves of several other privileges and incidents attending real property.

It seemed to be the regular consequence of the doctrine adopted by the courts of equity, in regard to mortgages, by considering them strictly and merely in the nature of securities for the mortgage money, and entitling the mortgagee to no other of the incidents or privileges of ownership in the lands, than what was requisite for the end of such security; that all such privileges and incidents of ownership of the lands as were not considered as becoming vested in the mortgagee for the purpose of his security, should be held to remain in the mortgagor; or, in other words, that he should to all purposes, not prejudicial to the mortgagee, be considered as the complete owner of the mortgaged lands.

And accordingly this was found to be the established doctrine in several instances, when only volunteers were interested; such as revocations under powers, and revocations of devises; as in the cases of Thorne v. Thorne, and Hall v. Dunch, and other like cases. That in the case of Lincoln v. Rolle the doctrine was

Tit. 32. c. 14.
Tit. 38. c. 6.
Show. Parl. Ca. 154.

expressly recognized, and admitted on both sides; because in equity a mortgage did not make the estate another's, and because a mortgage was not an inheritance, but a personal estate; and there seemed no reason in the world why these general incidents of complete ownership should be saved in favour of a devisee, or other volunteer, and not in favour of a wife, whose claims of dower stood upon the strongest grounds of moral and equitable right; and who was in many instances considered as entitled to relief in equity, in regard to an intended provision, when a devisee or other volunteer was not.

Agreeable to this doctrine was the case of Banks v. Sutton, where it was decreed in favour of the claim of dower out of an equity of redemption of a mortgage in fee; which decision was founded on a variety of authorities and reasons delivered by the Master of the Rolls; all which were equally forcible in the present case. That the case of Banks v. Sutton was directly in point of the present question; for though the Master of the Rolls would not take upon himself to determine the question, in regard to dower, out of a mere trust, created, not by the husband, but by some other person, with no time limited for conveying the legal estate; and avoided this point by shifting his ground to that of the husband's being entitled, under the express direction of the will under which he claimed, to have the estate conveyed to him at the age of 21., which circumstance, under the application of a common principle of equity, of considering that as done, which ought to have been done of course in equity, let the widow into the same degree of title as she would have had if the trustees had conveyed the estate to her husband at the time directed.

And as the principle on which the Master of the Rolls got rid of the first point did not apply to this, he accordingly found himself constrained, instead of changing his ground as before, to enter into a strict examination of it, and meet the objections to dower with authorities, inferences, and general reasoning, and through them to come to a professed decision of the point, as he expressly did, when he said—"He did not know or could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress." And as there were authorities in cases less favourable, he therefore declared that the widow of the person entitled to the equity of redemption of the mortgage in question, which was a mortgage in fee, had a right of redemption, and decreed her the arrears of her dower, from the death of her husband; she allowing the third of the interest of the mortgage money unsatisfied at that time: that an authority more directly in point than this could not be expected.

Tit. 12. c. 2. And though the subsequent case of the Attorney General v. Scott, before Lord Talbot, in which the widow was denied dower, was generally considered as an authority contrary to and superseding that of Banks v. Sutton, yet such a conclusion seemed too hasty, as the two cases appeared to differ materially; for in that of the Attorney General v. Scott, although there was a mortgage, yet the question did not turn upon that, because the legal estate was outstanding in trustees, in whom it was vested antecedent to such mortgage; consequently the decision in that case was on a direct proper trust, not on a mere equity of redemption. The difference between a direct trust, and an equity of redemption, and between the claim of a widow, and that of a devisee, or mere

volunteer, was strongly insisted upon; and the distinction between this case, and that of a claim of dower against a purchaser, fully enforced.

The Lords Commissioners, Loughborough, Ashurst, and Hotham, said, that the case of an estate by the curtesy in a trust, was the anomalous case, not the rule; that the wife should not have dower. And this point was so much settled, that it would be wrong to discuss it much.

The bill was dismissed, but without costs, the defendant not praying them.

Unless the Mortgage be for Years.

14. A widow is, however, entitled to dower of an equity of redemption of a mortgage for a term of years; because in that case the husband is seised of the freehold and inheritance. And where a mortgage of this kind is satisfied, the Court of Chancery gives the dowress relief, by removing the term; but if the mortgage be not satisfied, then the dowress must keep down a third of the interest, or pay off a third of the principal.

2 P. Wms. 716.

Subject to Crown Debts.

15. The statute 13 Eliz. c. 4. which enacts, that all the lands of accountants to the crown shall be liable to the payment of crown debts, extends to equities of redemption; and by the statute 25 Geo. III. c. 35. they may be sold under an extent by the Court of Exchequer.

Tit. 1. § 73. Tit. 14. § 115.

Rex v. Delamotte, Forrest R. in Exch. 162.

Is Assets in Equity.

16. An equity of redemption of a mortgage in fee is not assets at law; for the legal estate not being in the heir, he may plead *riens per descent.* As to the question, whether an equity of redemption was assets in equity, the courts reasoned by analogy from trust estates, which not being assets, they held that equities of redemption should not be assets. But when it was enacted by the statute of frauds that trust estates should be assets, the Court of Chancery determined

2 Vern. 61. 2 Atk. 294.

Tit. 12. c. 2.

that an equity of redemption should be assets in equity.

Creditors of Sir C. Cox, 8 P. Wms. 341.

17. Sir C. Cox having a term for years, made a mortgage thereof, and died possessed of the equity of redemption, leaving greater debts than his estate would extend to pay.

The question was, whether this mere equity of redemption was only equitable assets, and distributable equally *pro rata* among all the creditors, without regard to the degree or quality of their debts, or whether it should be applied in a course of administration; in which last case the bond creditors would swallow up all the assets, without leaving any thing for those by simple contract. Sir J. Jekyll delivered his opinion, that this equity of redemption was equitable assets only, the mortgage being forfeited at law, and the whole estate thereby vested in the mortgagee; so that it was barely an equitable interest.

Hartwell v. Chitters, Amb. 308. 4 Ves. Jun. 542.

18. In a subsequent case, Lord Hardwicke also held, that an equity of redemption of a leasehold estate was equitable assets. But in a modern case Lord Loughborough said, that an equity of redemption was not equitable assets as against judgement creditors, who had a right to redeem.

19. It is now held, that an equity of redemption in fee is not assets to pay simple contract debts, for it cannot be reached, at law, by any creditors. It is, notwithstanding, made assets in equity; but only to pay debts of that description to which the land would have been liable, if it had been a legal estate.

Plunkett v. Penson, 2 Atk. 290.

20. An equity of redemption of a trust estate is equitable assets, because creditors can only attach this kind of property in a court of equity.

And sometimes legal Assets.

21. When a person seised in fee makes a mortgage, by a demise for years, the equity of redemption

is assets at law; because the reversion, which attracts the redemption, being assets at law, the equity of redemption ought to be so too. And a creditor may have judgement at law, with a *cessat executio* during the term. 2 Atk. 294.

22. An equity of redemption is, however, not extendible by a judgement creditor, with or without the aid of the statute of frauds. Lyster v. Dolland. 1 Ves. Jun. 431.

23. It was formerly held, that where an equity of redemption was devised to an executor, for payment of debts, it then became legal assets; because the devise of it to the executor shewed the intention of the testator, that it should be applied like other assets. But where the equity of redemption was devised to trustees, upon trust to pay debts, it was equitable assets. Effect of a Devise for Payment of Debts. Girling v. Lee, 1 Vern. 63.

24. This doctrine has been altered, and it is said to be now established, that a devise to a mere executor shall bear the same construction as a devise to a trustee: that there is no reason to suppose the testator's meaning to be different in the one instance from the other: that even in the case of a mere power, on the part of the executor, to sell, the descent seems to be broken, inasmuch as the vendee is in by the devisor; but that, whether the descent in such case be broken or not, the assets shall be equally equitable: in short, that if the real estate be, by any means, given to the executor, the produce of it, when sold, shall not be applied in a course of administration, but be distributed as equity prescribes. Toller Exec. B. 3. c. 9.

25. An equity of redemption being alienable and devisable, it follows that all those who derive an interest from the mortgagor by purchase or devise, may redeem the mortgage. Where an equity of redemption is not disposed of by the mortgagor in his lifetime, or by his will, his heir becomes entitled to it. Who may redeem.

And it has been already stated, that if the descent be customary, the equity of redemption will go according to the custom.

A subsequent Incumbrancer. Greswold v. Marsham, 2 Chan. Ca. 170. Stonehewer v. Thompson, 2 Atk. 440. Shirley v. Watts, 3 Atk. 200. Crisp v. Heath, 7 Vin. Ab. 52.

26. Any subsequent incumbrancer may redeem a mortgage; such as a judgement creditor. But if the mortgage be of a term in gross, the judgement creditor must sue out a writ of execution, before he brings his bill to redeem; for, till execution, a judgement is not a lien on a term for years.

27. A creditor by statute has been allowed to redeem a mortgage, after a decree of foreclosure.

28. A bill was brought by the cognizee of a statute, acknowledged by the mortgagor, to redeem a mortgage, after a decree of foreclosure. The defendant pleaded the decree of foreclosure; that the statute was acknowledged after the mortgagee's bill was filed; that the mortgagee had no notice, and had made proper parties at the filing of his bill.

Mr. Vernon said, if an incumbrancer lies by, and suffers the mortgagee to obtain a decree of foreclosure, though he is not bound by the decree, because not made a party, yet if he afterwards brings a bill to redeem, he shall not be at liberty to except to the accounts stated by the Master, but shall pay the whole upon his redemption.

Lord Harcourt said—"This is a recent foreclosure; let the plaintiff redeem, upon payment of what is due, with costs."

A Dowress Jointress and Tenant by the Curtesy.

29. In the case of a mortgage for a term of years, if the widow is endowed of a third of the reversion, she may redeem the mortgage, and hold till she is repaid two thirds of the money advanced.

30. A woman entitled to a jointure out of lands that are in mortgage, may also redeem, as appears from the case of Howard v. Harris.

ante, c. 1.

31. A tenant by the curtesy may also redeem a mortgage, and hold the lands till he is satisfied.

32. The crown may redeem a mortgage on an estate which is forfeited by the outlawry of the mortgagor for high treason. The Crown.

33. Sir Roger Strickland, having made a mortgage of his estate, was afterwards indicted and outlawed for high treason. The Attorney General thereupon exhibited a bill in the Court of Exchequer, to discover the consideration of the mortgage, what was due upon it, praying that the crown might redeem, if any thing was due. Att. General v. Crofts, 4 Bro. Parl. Ca. 136.

The court directed several issues to be tried relative to the consideration of the mortgage. Upon trial, verdicts were found in favour of the mortgagee; but these verdicts were so general, that application was made, on behalf of the crown, for a new trial. This was not only refused, but the court, on hearing the cause upon the equity reserved, ordered the information to stand dismissed.

On an appeal to the House of Lords, this decree was reversed, and the Attorney General, on behalf of the crown, was admitted to redeem. Vid. Pawlett v. Att. Gen. Hard. 465.

34. It is a maxim, that he who will have equity must himself do equity; in consequence of which, it has been long established, that when a mortgagor requires the redemption of his estate, he must in his turn allow full equity to the mortgagee. Whoever redeems must do Equity. St. John v. Holford, 1 Cha. Ca. 97.

35. A person borrowed money upon mortgage, and afterwards borrowed more money from the same person upon bond: the mortgage was forfeited. The Court said, although there was no special agreement proved in the case that the land should stand as a security for the bond debt, yet the mortgagor should not redeem without paying both. Baxter v. Manning, 1 Vern. 244.

Challis v. Casborn, Prec. in Cha. 407. Archer v. Snatt, 2 Stra. 1107. 2 Ves. Jun. 376.

36. This doctrine was however soon altered; and it is said by Mr. Vernon, and agreed to by the Court, in Trin. 1715, that if a man had a debt owing to him by mortgage, and another on bond from the same person, he could not tack them together against the mortgagor; but would be let in to a redemption on payment of the mortgage money only.

Idem. Shuttleworth v. Laywick, 1 Vern. 245.

37. It has however been always held, that the rule applies to the heir at law of the mortgagor, who cannot redeem a mortgage made by his ancestor, without paying off the money due on bond; because, upon the ancestor's death, the bond becomes the heir's own debt.

Anon. 2 Vern. 177. 1 P. Wms. 776.

38. The same rule has been adopted in the case of mortgages for terms of years. Thus if the executor of the mortgagor brings a bill to redeem, he must pay both the mortgage money and the bond debt.

Tit. 38. c. 1.

39. Since the statute made against fraudulent devises, the devisee of an equity of redemption cannot redeem without paying off a debt upon bond, as well as the money due upon mortgage; because that statute puts the devisee in the same situation as the heir.

1 Ab. Eq. 325. Prec. in Cha. 407.

Hallelay v. Kirtland, 2 Ch. R. 361.

40. If a person first lends money upon bond, and afterwards takes an assignment of a mortgage, he has the same equity against the mortgagor and his heirs, to have both debts paid.

41. If part of the money, originally secured by a mortgage, be paid off, and a farther sum is borrowed from the same parties, upon a defective security, no redemption will be granted unless both sums are paid.

Reason v. Sacheverell, 1 Vern. 41. 2 Cha. Ca. 98.

42. Husband and wife mortgaged the wife's land by fine for 400*l.*, and the mortgage was forfeited. The husband paid off part of the mortgage money,

but afterwards borrowed it back again. Decreed that the mortgagee having the estate in law in him, by the forfeiture of the mortgage, he should hold the land against the heir of the wife, until the whole money was paid.

43. This privilege is only allowed against the mortgagor, his heir or devisee; not against a purchaser or assignee of the equity of redemption, who may redeem without discharging a bond debt due to the mortgagee; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not. 1 Ves. 87.

44. A., seised in fee of lands, made a mortgage to B. for 100*l.*, afterwards borrowed 100*l.* more of B. upon bond, and died. The heir at law conveyed the inheritance and equity of redemption to trustees, in trust for the payment of all the bond and simple contract debts of his father, equally; after which the trustees brought their bill to redeem against B., who insisted on being paid his debt by bond, as well as that by mortgage. Coleman v. Wynce, 1 P. Wms. 775. Prec. in Cha. 511.

It was decreed, that though the heir must have paid the bond debt, before he was allowed to redeem, because it became his debt on the death of his ancestor, yet it could not be said to be due from the assignee of the heir, the bond being no lien upon the land. Bayly v. Robson, Prec. in Cha. 89.

45. A settlement was made by a father on the marriage of his son, with a covenant, that it should be free from incumbrances; in consideration of which the son covenanted to reconvey part of the estate, after the father's death, or to pay 300*l.* to such person as the father should appoint. The father created an incumbrance of 300*l.* by mortgage, afterwards appointed 300*l.* to his daughter, and died. The son Troughton v. Troughton, 1 Ves. 86.

brought a bill to have the estate disencumbered of that mortgage; also to have a bond of the father's to the mortgagee delivered up, and discharged out of the assets of the father.

Lord Hardwicke said, the plaintiff had a plain equity to have the estate disencumbered of the mortgage brought on it, in fraud of the marriage settlement.

As to the bond, where the mortgagor of an estate, either before or after the marriage, contracted another debt with the mortgagee, for which he gave a bond, and died, and the equity of redemption descended to the heir at law, a court of equity would permit the mortgagee to tack the bond to the mortgage, because otherwise it would cause an unnecessary circuity; and the heir at law was debtor for both. But where the person claiming the equity of redemption was a purchaser for a valuable consideration, there was no right to tack the bond to the mortgage, because the estate was not liable to the bond debt.

Though the plaintiff was entitled to be indemnified, as against the father, for what he was bound to pay by the father's bond, yet he was entitled only out of the father's assets.

46. If there are several incumbrances on an estate, and a prior incumbrancer claims a debt secured by bond, he will not be allowed to add it to his mortgage, but it will be postponed to all real incumbrances, whether by mortgage, judgement, or statute. For the bond is no charge on the estate: nor has he the same equity against a subsequent incumbrancer, as against an heir at law; who is liable to the bond, if he has assets.

Morrett v. Paske, 2 Atk. 52.

47. A creditor, by judgement, in 1698, for 600*l.*, comes to an account in 1707 with the conusor, and settles the remainder due upon the judgement at 420*l.*,

and then takes a mortgage in fee for that sum, as a collateral security to the judgement. One Saunders, an attorney, in 1716, takes an assignment of this mortgage, in which there is a recital, that 90*l.*, the consideration of the assignment, was then the full worth of the estate; and the assignment, likewise, was made at a time when there was a suit depending between particular creditors, upon several other estates of the mortgagor; in conjunction with judgement creditors at large, and the representatives of the mortgagor. Saunders was in possession, too, of another mortgage in 1688, upon the same estate as was subject to the judgement in 1698, and the mortgage in 1707.

Lord Chancellor—"Saunders shall not be allowed to tack the two mortgages together, viz. that in 1688, and the other in 1707, so as to defeat intermediate incumbrancers between the years 1688 and 1698, and yet the mortgage in 1707 shall have relation back to the judgement in 1698, and, by consolidating them together, shall entitle Saunders to receive the sum due upon that judgement prior to creditors after the year 1698: but as to money reported due since the year 1707, Saunders is to be paid only in priority to creditors subsequent to 1707.

"The rule of the court, as to prior incumbrancers taking in a subsequent incumbrance, so as to tack it to the prior, is, where he is a *bonâ fide* purchaser of the *puisne* incumbrance, without notice of intermediate ones: but here, the *puisne* incumbrance was bought in while there was such a *lis pendens* as will make Saunders a purchaser with notice. Vide Ch. 5.

"The words in the recital of the assignment of the mortgage in 1716, that 90*l.*, the consideration money, was the full worth of the estate at that time,

naturally imply, that there were other immediate incumbrances; and, therefore, to give Saunders the benefit of tacking both mortgages, would be contrary to his own intentions, for, at the time he took the assignment of this *puisne* incumbrance, he must know the estate was worth no more, from the very words of the recital.

" If a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers.

" The reason why a mortgage may be tacked to a judgement is this, because the judgement creditor, by virtue of an *elegit*, may bring an ejectment, and hold upon the extended value; and, as he has the legal interest in the estate, the court will not take it from him: but this holds only where the same person has both judgement and mortgage in the same right, and not where he has the judgement in his own right, and the mortgage in another right, as a trustee only.

" Where there is a prior mortgagee who has a *puisne* incumbrance, a second mortgagee shall not redeem the prior, without redeeming the *puisne* at the same time; and the reason is, because the legal estate is in the first mortgagee; and this court will not take away that benefit from him, provided he had no notice of the second at the time he bought in the *puisne* one.

" Where a prior incumbrancer, by mortgage, judgement, or statute staple, has a bond likewise

from the mortgagor, the mortgagor, in his lifetime, may redeem the mortgage, &c. without paying off the bond debt: otherwise as to the heir at law, because the moment he redeems the estate, it shall be assets in his hands; and, for this reason, the court compels him to discharge the bond as well as the mortgage.

"Where there are several incumbrancers upon an estate, as in the present case, and the prior incumbrancer has a bond likewise, he cannot insist upon being paid both, which would be a prejudice to the *puisne* incumbrancers: but his bond shall be postponed to all other incumbrancers, whether by mortgage, judgement, or statute staple; for he has not the same equity against a *puisne* incumbrancer as against an heir at law, who is liable in respect of assets.

"An agent, trustee, heir at law, or executor, purchasing a *puisne* incumbrance, as against another incumbrancer, shall be paid no more than what he gave for this incumbrance; otherwise as to a prior creditor, who *bonâ fide* buys in a *puisne* incumbrance, though he did not give the full value for it: the rule is laid down generally, indeed, by Lord Chancellor Jeffreys, in the case of Williams v. Springfield, as well with regard to creditor and creditor, as to trustees, heir at law, or executor: but I cannot say that I remember any decree in this court, subsequent to this case, where it has been laid down as a general rule, but has been much more narrowed since, and holds only, as I observed before, with regard to agent, trustee, heir at law, or executor."

48. In a subsequent case the question was, whether a mortgagee, who lent a further sum upon bond, should be allowed to tack it to his mortgage; in pre-

Heams v. Bunce, 3 Atk. 630.

ference to other creditors, under a trust for payment of debts, created by the will of the mortgagor.

Lord Hardwicke said he had considered this case, and was inclined to think the mortgagee should not be allowed to tack the bond to the mortgage, with regard to the heir of the mortgagor. The reason why he should not redeem the mortgage, without paying the bond likewise, was to prevent a circuity, because the moment the estate descended upon him, it became assets in his hands, and liable to the bond. A devisee too of the mortgaged premises, for his own benefit, was subject to the same rule, since the statute of fraudulent devises, made in favour of bond creditors. But this was a devise in trust for payment of debts, and the descent was consequently broke; so that he was of opinion the mortgagee could have no priority, with regard to his bond; but as to that, must come in *pro rata*, with the rest of the creditors, under the trust. But if the counsel for the mortgagee had an inclination to be heard on this point, it should stand over.

The Attorney General, who was counsel for the mortgagee, said, he thought the point was too strong against his client to be maintained; and the court thereupon made an immediate decree accordingly.

Lowthian v. Hassell, 3 Bro. R. 162.

49. Upon further directions the only question was, whether Mr. Carforth, a creditor by mortgage of Andrew Whelpdale deceased, and also a bond creditor for 1,834*l.* 3*s.* should tack his bond debt to his mortgage, against other specialty creditors.

Lord Thurlow—"The only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of suits: It is solely matter of arrangement for that purpose, for, in natural justice, the right has no foundation. The principle explains the rule, and

therefore it can go no further. The creditors, having another specific security, cannot give him in justice any priority for a lien that is subsequent. There being no foundation in justice, the only question is, whether the court is in the practice of doing it; and it has not done it in any case but that of the heir, and merely to prevent circuity."

Hamerton v. Rogers. 1 Ves. Jun. 513.

50. It has been long settled, that where a man makes two several mortgages, of two several estates, to the same person; and one of them proves defective in title or value; neither the mortgagor nor his heir will be admitted to redeem one, without the other.

51. The plaintiff's bill was to redeem a mortgage made by his father to the defendant, who by his answer insisted that the plaintiff's father had made him two several mortgages of several lands; that the plaintiff endeavoured to defeat him of one of those mortgages, by reason of an entail, and hoped that in equity he should redeem both or neither.

Margrave v. Le Hooke, 2 Vern. 207.

Per curiam—He shall redeem both or neither; and so if one mortgage had been deficient in value, and the other mortgage had been worth more than the money lent upon it, the heir should not have been admitted to redeem the one without the other.

52. The plaintiff, as assignee of a bankrupt, brought his bill to redeem a mortgage of the manor of N. made by the bankrupt to the defendant. The defendant by his answer insisted that he first lent the bankrupt 200*l.* on a mortgage of a particular tenement, and afterwards lent him 300*l.* on a mortgage of the manor of N. which was of better value than the money due; but the first mortgage was deficient in point of value. *Per curiam*—If the plaintiff will redeem one, he shall redeem both.

Pope v. Onslow, 2 Vern. 286.

53. Lord Hardwicke appears not to have considered this case as an authority. But in Ambler's Reports the case of Titley v. Davis, before Lord Hardwicke, is cited, where two estates were separately mortgaged to the same person, by one and the same deed. The purchaser of the equity of redemption of one of the estates brought a bill to redeem the estate which he had bought; and held by the Master of the Rolls that he was not entitled to redeem one only, but must redeem both; and the decree affirmed by Lord Hardwicke.

ex parte Carter, 733.

Also the case of Tribourg v. Lord Pomfret and Wilkins, at the Rolls, 16 July 1773. The plaintiff had two distinct mortgages, upon two different estates, made by the defendant Wilkins, by different instruments. Lord Pomfret had a second mortgage upon one of the estates only.—Bill to be redeemed by Lord Pomfret and Wilkins, or to foreclose.

Sir T. Sewell, M. R. decreed Lord Pomfret to redeem both mortgages, or to stand foreclosed.

Roe v. Soley, 2 Black. R. 726.

54. In a modern case Lord Alvanley, when Master of the Rolls, said, that if two separate estates were mortgaged, by which he understood the legal estate absolutely, and at law irredeemably conveyed, the Court of Chancery would not interpose in favour of the redemption of one, without the redemption of both. Pope v. Onslow, followed by two modern cases, had settled the point, that as against the mortgagor or his assigns, and therefore he must suppose against all creditors; if there were two legal mortgages, which at law were become absolute (for that must be the principle) the mortgagee should insist on being redeemed as to both, or neither; and that Lord Kenyon had acted upon this doctrine.

Jones v. Smith, 2 Ves. Jun. 372.

Ireson v. Denn, 2 Cox. R. 425.

55. With respect to the time within which a redemption is allowed, the courts of equity have not established any positive general rule, when the length of possession of the mortgagee shall bar the mortgagor's right of redemption; as they consider that lands are usually mortgaged for much less than their real value, and that when a mortgagee receives his principal, interest, and costs, he cannot complain of an injury.

No precise Time is fixed for Redemption.

56. It being however extremely difficult for a mortgagee, who has been long in posession, to make out an account of the profits he has received, the Court of Chancery has laid it down as a rule, by analogy to the statute of limitations, that where the mortgagor has suffered the mortgagee to continue for twenty years after forfeiture, in the quiet and uninterrupted possession of the lands mortgaged, the right of redemption shall be presumed to be abandoned.

But Twenty Years Possession is a Bar.

Tit. 31. c. 2.

57. In 13 Cha. II., upon a claim of redemption, it was pleaded that twenty years had elapsed since the mortgage had been forfeited; and that the land had descended to the heir at law of the mortgagee who had sold it. The plea was held good.

Clapham v. Bowyer, 1 Ch. Rep. 286. Pearson v. Pulley, 1 Cha. Ca. 102.

58. In 29 Cha. II. upon a re-hearing before Lord Keeper Bridgeman, assisted by Vaughan and Turner, Justices, concerning the redemption of a mortgage, made upwards of forty years before; the Lord Keeper declared that he would not relieve mortgages after twenty years; for that the statute 21 Jac. c. 16. did adjudge it reasonable to limit the time of one's entry to that period; and though matters in equity were to be governed by the course of the court, it was best to square the rules of equity as near the rules of reason and law as might be.

White v. Ewer, 2 Vent. 340.

59. Although there be a decree to redeem and account, yet if it be not prosecuted within twenty years, no redemption will be allowed.

St. John v. Turner, 2 Vern. 418.

60. Mr. St. John mortgaged certain lands in 1639 to Sir Richard Holford, who entered into possession of them. In 1663 a bill was brought by the mortgagor for redemption, and a decree obtained to redeem; but he dying, the suit was revived by his three daughters; and in 1672 another decree was obtained to account. The plaintiff having purchased from the daughters of St. John several estates—amongst the rest, their equity of redemption—brought his bill in 1700 to redeem; which was dismissed.

Aggas v. Pickerell, 3 Atk. 225.

61. It was resolved by Lord Hardwicke, after a search for precedents, that a plea of the statute of limitations should be allowed to a bill for redemption, after a mortgagee had been in possession for thirty years.

Exceptions, 1°. Where there is a Disability.

62. The Court of Chancery, in further imitation of the statutes of limitation, has determined, that where the neglect to claim a redemption has arisen from infancy, coverture, imprisonment, or absence from the realm; a possession of twenty years shall not operate as a bar to redemption.

Tit. 31. c. 2.

Cornel v. Sykes, 1 Cha. Rep. 193.

63. Alice Cornel being seised in fee of copyhold lands, she and her husband mortgaged them to Doctor Mountford for 30*l.* The premises being forfeited by nonpayment of the mortgage money, Doctor Mountford took possession thereof, and disposed of them to his wife for life, the reversion to the defendant. Alice Cornel lived 26 years after the mortgage was made, and then died, leaving the plaintiff her son and heir, who brought his bill to redeem.

The defendant insisted that the plaintiff ought not to redeem the mortgage, being of such long stand-

ing, and the premises having been conveyed away to a stranger. A redemption was notwithstanding decreed, on account of the coverture of Alice Cornel.

64. Where twenty years have elapsed after the mortgagee's entering into possession, and the time has begun to run against the ancestor, no legal disability in the heir will have any effect. vide Tit. 31. c. 2.

65. The plaintiff's father had mortgaged the estate in question in 1686. Ten years after, this mortgage was assigned over to the defendant, who by agreement was then let into possession, and had continued so ever since. Knowles v. Spence, 1 Ab. Eq. 315.

The mortgagor had been several years dead, leaving the plaintiff's father, his eldest son and heir, of full age, who died in 1714, leaving the plaintiff, his son and heir, about 12 years of age, who brought his bill for an account, and to be let in to a redemption of the estate, of which the defendant had been in possession thirty-three years, so that he was greatly overpaid both his principal and interest.

Lord King dismissed the bill; and ordered it to be entered down as one of the reasons of such dismissal, that the plaintiff had no remedy, by ejectment at law, to recover the possession; being barred by the statute of limitations, and he thought that a reasonable guide for a court of equity to follow; and though the plaintiff was an infant at his father's death, yet the twenty years had elapsed before, when there was no infancy; and therefore would afterwards run against infants.

66. On a demurrer to a bill to redeem a stale mortgage, where the mortgagee appeared by the bill to have been in possession above twenty years, the court held, the defendant need not plead the length of time, but might demur; that no redemption should Jenner v. Tracey, cited 3 P. Wms. 287. *n.*

be allowed in such case, unless there was an excuse by reason of imprisonment, infancy, or coverture, or by having been beyond sea; and not by having absconded, which was an avoiding or retarding of justice. That there did not seem to be any certain time when the length of possession of the mortgagee should bar the mortgagor's right of redemption; but as twenty years would bar an entry or ejectment; abstracting from the excuses above mentioned, there was the same reason for allowing it to bar a redemption. The demurrer was allowed by Lord King.

Belch v. Harvey, cited 3 P. Wms. 287. *n.*

67. The same rule was agreed to in another case by Lord Talbot; who likewise declared it to be his opinion, though the case was afterwards compromised, that whereas the Court of Chancery had not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clause of the statute of limitations; so, after the disability removed, the time fixed for prosecuting, in the proviso, which was ten years, ought in like manner to be observed.

2° Where an Account has been settled.

68. As the difficulty of accounting is the principal reason that courts of equity will not allow a mortgage to be redeemed, after the mortgagee has been twenty years in possession; when that objection is removed, by an account having been settled within twenty years, the right of redemption will be thereby preserved.

Proctor v. Cowper, 2 Vern. 377.

69. The bill was to redeem a mortgage made in 1642. The mortgagee entered in 1650: three descents on the defendant's part, and four on the part of the plaintiff; yet the length of time being answered, for the greatest part, by infancy or coverture, and forasmuch as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up

by the mortgagee, the court decreed a redemption, and an account, from the foot of the account in *1686.*

70. A mortgage, after forty years possession in the mortgagee, was held to be redeemable, upon the foot of a stated account, with an agreement for turning interest into principal; and the decree was affirmed by the House of Lords. Conway v. Shrimpton, 5 Bro. Parl. Ca. 187.

71. Length of time was insisted on by the defendant as a bar to the redemption of a mortgage, sought by the plaintiff's bill, it being 29 years old. Anon. 2 Atk. 333.

Lord Hardwicke said, he was not for encouraging redemption of mortgages of very long standing; but then the court must not wink so hard as not to allow it in any case. There was a pretence of coverture, which was no excuse, because if a woman became afterwards discovert, the statute of limitations would run from that time; and though she should marry again, it would run after the second marriage.

The next excuse was, that there was a tenancy by the curtesy; but there would be no bounds to a redemption, if that was an excuse; no mortgagee could ever be quieted in the possession; for it was of no consequence to the mortgagee, who had the equity of redemption; if they did not make use of that right, they should be barred.

But though the mortgage was in 1713, in this case, yet no longer than 1730, (12 years) the clerk to the solicitor for the mortgagor had actually settled an account of what was due for principal and interest, in order to pay off the mortgage: and though no further proceedings had been, yet that should save the right of redemption.

72. Any act of the mortgagee, by which he acknowledges the transaction to be still a mortgage 3° Where the Mortgage has been

acknowledged.

within 20 years from the time when a bill is brought to redeem, will preserve the right of redemption: as if the mortgagee, by his will, disposes of the money, in case the mortgage be redeemed.

Orde v. Smith, Sel. Ca. in Cha. 9.

73. A. in 1679 mortgaged lands to J. S. for a small sum of money, by an absolute conveyance and defeazance; soon after A.'s necessities forced him to go abroad, where he died, and his heir knew nothing of the mortgage. In 1702 J. S. devised, that if the mortgage should be redeemed, the money should go in a particular manner. About 16 years after the will, a bill was filed for redemption, to which was objected the great length of time; and that, by the settled rules of the court, a mortgage should not be redeemed after 20 years.

Sir Joseph Jekyll held, that decreeing a redemption would be no wrong or hardship to the party, for he would have a greater interest than the law then allowed; that the not decreeing a redemption would be establishing a very great imposition; and though absolute conveyances and defeazances were formerly much used in mortgages, yet the same was left off as dangerous, by losing the defeazance, which was avoided by being in the same deed; that there was sufficient for redemption by the declaration in the will, where the mortgagee called it a mortgage. Lord Commissioner Gilbert was of the same opinion, and a redemption was decreed.

Perry v. Marston, 2 Bro. R. 397. Whiting v, White, 2 Cox. R. 290.

74. In a modern case Lord Thurlow said, that a man taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule, that a mortgagor shall not redeem after 20 years.

75. Where the mortgagee submits to be redeemed, no length of time will operate as a bar to redemption.

76. A bill was brought to redeem, where the mortgagee had been in possession for 25 years. The defendant, as it was a family affair, submitted to be redeemed, notwithstanding the length of time.

Proctor v. Oates, 2 Atk. 140.

Lord Hardwicke said, he saw no colour for redemption; but, on the defendant's submission, he decreed an account of what was due, and directed the plaintiff to pay the same in six months after the Master's report, whereupon the defendants were to convey; but, in default, the bill was to be dismissed without costs.

Whiting v. White, Coop. R. 1. Hodle v. Headly, 1 Ves. & B. 53. § 3 *b*.

77. Where no particular time is appointed for payment of the mortgage money, as in the case of Welsh mortgages, a redemption will be decreed at any time: for it is the duty of the courts, both of law and equity, to effectuate the agreement of the parties.

4° Where no Time is appointed for Payment.

78. On a bill to redeem a mortgage, the defendant demurred, because the mortgage was sixty years old; but the demurrer was overruled, it appearing to have been agreed that the mortgagee should enter and hold till he was satisfied, which was in the nature of a Welsh mortgage; and in such a case length of time was no objection.

Ord v. Henning, 1 Vern. 418.

79. One Davids made a mortgage of lands in Wales, by lease and release, to one Reynolds and his heirs, for securing 300 *l*. The proviso was, that if Davids, his heirs or assigns, should at Michaelmas 1702, or any Michaelmas following, pay to Reynolds, his heirs or assigns, the sum of 300 *l*., and all arrears of rent or interest which should be then due, the conveyance was to be void.

Howell v. Price, Prec. in Cha. 423. 1 P. Wms. 291.

It was decreed that this was in the nature of a conditional purchase, subject to be defeated on payment, by the mortgagor or his heirs, of the sums stipulated,

on any Michaelmas-day, at the election of the mortgagor or his heirs: so that there was an everlasting subsisting right of redemption, descendible to the heirs of the mortgagor, which could not be forfeited at law, like other mortgages; therefore there could be no equity of redemption, or any occasion for the assistance of a court of equity; but the plaintiffs might, even at law, defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any Michaelmas-day to the end of the world.

80. This perpetual right of redemption may however be lost by a subsequent agreement.

Hartpole v. Walsh, 5 Bro. Parl. Ca. 267.

81. Robert Hartpole, in consideration of 600*l.*, conveyed certain lands by feoffment to Oliver Walsh in fee, subject to redemption, on payment of the money, at any last day of July or December.

By a subsequent deed, Hartpole, in consideration of 2,300*l.*, conveyed the premises comprised in the former deed, and also other premises, to Walsh; and covenanted, for himself and his heirs, that whenever Walsh, his heirs or assigns, should give him 18 months notice in writing, requiring payment of the said 2,300*l.* that then Hartpole, his heirs or assigns, should pay the said 2,300*l.* within 18 months after such request.

After a period of 100 years had elapsed, the heir of the mortgagor filed a bill for redemption, which was dismissed, and the decree of dismissal affirmed by the House of Lords, upon the ground, I presume, which is st printed reasons; that the second mo omprising all the mortgaged premises, power of the mortgagee, or his repr scertain and limit the time

of redemption, by demanding the mortgaged money; and such demand was admitted to have been made by the son of the mortgagee: therefore, from that time, the mortgage, whatever it was originally, became of such a nature, as made the equity of redemption liable to a foreclosure, either by a decree, or great length of time.

82. Where lands are conveyed to a person till, by perception of the rents and profits, he is satisfied his principal and interest, no length of time will bar the redemption.

83. One Palmer, by lease and release and fine, in 1699, conveyed two houses to Hambly and his heirs, until he should receive by the rents and profits thereof 50*l.*, then to the use of James Palmer for life, &c. The mortgagee entered and continued in possession upwards of 40 years; upon a question whether these two houses were then redeemable, Lord Hardwicke held they were, for that no bar arose from the length of time. He said there was no doubt, if this mortgage had been made in the common form, and subject to a forfeiture upon nonpayment, the length of time would have been a bar; the courts of law and equity squaring their rules by the statute of limitations. But this was a conveyance of the inheritance for securing the sum of 50*l.* advanced by Hambly, in trust that he should continue in possession till, by perception of the rents and profits, he should be satisfied his principal and interest. There never could be a forfeiture under this deed, for the mortgagee was only in the nature of a tenant by *elegit*. As soon as his principal was satisfied, by being paid off, or by perception of the rents and profits, the estate ceased in Hambly, and Palmer or his representatives might have maintained an eject-

Yates v. Hambly, 1 Atk. 360.

ment. Nor would any bar have arisen from length of time, unless the statute of limitations had run, by the mortgagee's continuing in possession 20 years after the money had been paid off. He said he did not see this case at all differed from a Welsh mortgage, though he did not say but there were circumstances which might create a bar, even in that case. But in common Welsh mortgages, on tendering principal and interest, they might come into the Court of Chancery at any time.

The first objection was, that it was liable to all the mischiefs in common cases, and was a breach of the rule laid down in Chancery, by analogy to the statute of limitations. But to this the answer was, that there was nothing for the statute of limitations to operate upon, for here was no forfeiture: indeed, after an account was taken, if it should appear that the mortgagee had continued in possession ever since, the statute of limitations would run.

The second objection was, that it was unreasonable the mortgagee should be a perpetual bailiff to the mortgagor. But that would not hold here, for the mortgagee took the estate, subject to a perpetual account; and the court ought not to relieve him from his own contract and agreement.

Lord Hardwicke concluded with declaring that the plaintiff was entitled to redeem, upon the common terms of paying principal, interest, and costs; and to have an account of what had been received, and what remained due; and was not obliged to bring an ejectment for the possession, but should have a decree for it, after the mortgage was reported to be satisfied.

5. Where the Mortgagor continues in Possession.

84. Where the mortgagor continues in possession, no length of time will bar the equity of redemption:

and even a possession of part of the mortgaged premises will preserve the right to redeem.

85. A person, in 1687, mortgaged a set of chambers in Gray's Inn, but continued in possession until 1700, at which time an order of the Bench was made to deliver possession to the mortgagee, who entered into part; but as to the remainder, the mortgagor continued in possession until 1708, leaving the plaintiff an infant. Rakestraw v. Brewer, Sel. Ca. in Cha. 55.

A bill was brought to redeem in 1726. It was so decreed at the Rolls, and affirmed by Lord King, who said nothing was more clear, than that if the mortgagor was in possession of any part, he should be admitted to redeem the whole, as being in possession thereof; and part he could not, separately from the whole; therefore he should redeem the whole.

86. Where any species of fraud has been practised by a mortgagee, at the time when the mortgage was made, a court of equity will interfere, and give relief, notwithstanding a possession of 20 years. 6° Where there is Fraud in the Mortgagee.

87. Thus, in the case of Orde v. Smith, which has been already stated, it was expressed that the redemption should be with the mortgagor's own money. And the Master of the Rolls said, that the words in the defeazance, however fettered, signified nothing, where the money was to be repaid; for the borrower being necessitated, and so under the lender's power, the law made a benign construction in his favour. But this was a fraud in its creation, and in such case was redeemable after any length of time. ante, § 73.

TITLE XV.

MORTGAGE.

CHAP. IV.

Of the Payment of the Mortgage Money and Interest.

1. *The Personal Estate first liable.*
4. *Even in favour of a Devisee.*
9. *A Disposition of the Personal Estate will not alter this Rule.*
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15. *Lands devised for Payment of Debts are applied.*
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27. *The Personal Estate not liable.*
28. 1° *Where the Debt was contracted by another.*
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36. 2° *Where an Equity of Redemption is purchased.*
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43. *Mortgage by Husband and Wife.*
51. *Proportions between Tenant for Life and Remainder Man.*
53. *Where Tenant for Life or in Tail pay off a Mortgage.*
55. *Of Interest.*
59. *Interest upon Interest not allowed.*
61. *Exceptions:* 1° *Where a Mortgage is assigned.*
62. 2° *Where there is an Account stated.*
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64. 3° *Where the Time is enlarged.*
66. *Infants are excepted.*
68. *Who are bound to pay Interest.*
74. *Mortgage Money is payable to the Executor.*

SECTION 1.

The Personal Estate first liable.

IT is a rule in equity, where a person dies, leaving a variety of funds, one of which must be charged with a debt, that the fund which received the benefit, by contracting the debt, shall make satisfaction. It has, therefore, been long settled, that if a person bor-

ows money on mortgage, and dies, leaving a real and ersonal estate, without specifically charging either of hem with the payment thereof, his personal estate hall be first applied towards the payment of the ortgage, because it was increased by the money bor- owed. The executor of a mortgagor is therefore in eneral compellable to redeem a mortgage for the enefit of the heir, even though there be no covenant or the payment of the money.

Cope v. Cope, 1 Salk. 449.

2. A father and son joined in a mortgage of the ather's estate; the father received the money, and he son conveyed in consideration of 10*s.* There was no covenant in the mortgage for payment of the money.

Lloyd v. Thursby, 1743. MS. Rep.

The bill was brought to make both the real and personal assets of the father and son liable to the mortgage money, the estate mortgaged being subject to prior incumbrances.

Lord Hardwicke said, it had been determined that the personal assets were liable, though there were no covenant in the deed for payment of the mortgage money, because there was a debt contracted by the borrowing. This demand went a step farther, seeking to charge the real assets of the father, in the hands of the son; which were not liable in the hands of the heir, even by a bond or covenant of his ancestor, unless the heir was specially named. As to the son, his assets were no way liable, for he conveyed only in consideration of 10*s.*, and had no part of the money, consequently was no debtor; and neither his real nor personal assets were bound.

3. In the case of Howell v. Price, it was contended that the personal estate of the mortgagor was not subject to the payment of the mortgage, because it was a conditional sale between the mortgagor and

ante, c. 3. § 79.

mortgagee, that the mortgagee should have the land until the mortgagor or his heirs should repay the money; that it was in the election of the mortgagor whether he would pay it or not; nor would any action of debt lie for it.

The Court, however, decreed, that the personal estate of the mortgagor should be applied in payment of the mortgage.

Even in favour of a Devisee.

4. The personal estate is liable to the payment of a mortgage, in favour of a devisee, or *hæres factus*, as well as in favour of an *hæres natus*, although there be no bond or covenant for payment of the money.

Popley v. Popley, 2 Cha. Ca. 84. 1 Vern. 36. Cases Temp. Finch, 401.

5. Thus it was declared by Lord Nottingham, in 1681, "that not only the heir, in case he be charged with debts of the ancestor, but a devisee of the land shall be unburthened too of a debt lying on the land, by the personal estate in the hands of the executor or administrator; and so shall a devisee of a mortgage."

King v. King, 3 P. Wms. 359.

6. Thomas King, having freehold and copyhold lands, mortgaged the copyhold for 350*l.* He afterwards devised the same copyhold to his nephew and his heirs; and, after all his debts paid, he devised the rest of his estate, real and personal, to his son and his heirs, and appointed him executor.

It was determined by Lord Talbot, that the personal estate of the mortgagor was liable to the payment of this mortgage, though there was no covenant or bond for the payment of it.

2 Atk. 426.

7. Lord Hardwicke states it to have been determined by Lord Nottingham, that a devisee of part of the real estate was entitled to have a mortgage paid off out of the personal estate, and that this opinion had been followed ever since.

Serle v. St. Eloy, infra.

8. Though the estate in mortgage be devised, subject to the incumbrance, yet the personal estate

will be applicable to the payment of the mortgage, especially when there are any circumstances indicating such an intention.

9. It has been stated in Title I. § 61. that a testamentary disposition of the personal estate will not exempt it from the payment of debts; therefore, in a case of this kind, the heir or devisee will be entitled to have a mortgage paid off out of the personal estate. A Disposition of the Personal Estate will not alter this Rule.

10. Where a testator charges his lands with the payment of his debts, this will not exonerate his personal estate: for such a charge can only be intended for the purpose of creating an additional fund, in case the personal estate should not be sufficient. Nor a Charge on the Real Estate. 9 Mod. 187.

11. Lord Hardwicke has said—"I know of no authority where the words, I make my real estate liable to pay my debts, will exempt the personal estate, without any special exemption of personal estate: nor has the court ever said that personal estate shall be applied only to pay legacies, and not the debts; nor will making a particular estate in land liable to pay debts, exonerate the personal estate, because it is the natural fund for payment of debts. Suppose a man devises a real estate liable to the payment of debts, and subject to those debts, gives it over to another, or what remains after payment of debts, which is all one; if there are not express words to exempt the personal estate, it shall be first applied." 3 Atk. 202.

12. Where a term of years is created for the purpose of raising a fund to pay debts, and legacies, yet this will not exempt the personal estate.

13. A person demised lands to trustees for 500 years, upon trust for himself for life; after his death, upon trust, out of the rents and profits, to pay his Cook v. Gwavas, 9 Mod. 187.

debts, legacies, &c. It was decreed that the personal estate should be applied in exoneration of the real.

Lovel v. Lancaster, 2 Vern. 183.

14. It is the same where a provision is made, by way of trust of the inheritance of lands, to pay debts; the personal estate will still be liable; therefore, where lands were devised to a person for payment of debts, the personal estate was directed to be first applied for that purpose.

Lands devised for Payment of Debts are applied.

15. Where the personal estate is deficient, the money arising from the sale of lands devised for payment of debts will be applied in satisfaction of a mortgage.

Serle v. St. Eloy, 2 P. Wms. 386.

16. A testator began his will by directing that his executor should pay and discharge all his just debts, and that he should raise sufficient to pay the same. He then devised his manor at Godalmin to Jane Styles and her heirs, at the age of twenty-one, or marriage; subject nevertheless to the incumbrances that were or should be upon it, at the time of his decease; in the mean time, and until she should arrive at her said age or marriage, the rents, issues, and profits to be paid by his executor into the hands of her father or mother. He then devised to his brother, Leonard Child and his heirs, the reversion of the manor of W., subject nevertheless to the payment of such of his debts as should remain unpaid. All the rest of his real and personal estate, not therein before specifically disposed of, he devised to John St. Eloy, his heirs and assigns, in trust to sell the same, and thereout to pay his debts and general legacies. In case there should be any deficiency, and that any of his debts and legacies should remain unpaid, then he charged the same on the reversion and inheritance of the manor of W.,

and thereby directed the said Leonard Child and his heirs to pay off the same.

It was said that the lands in Godalmin, which were mortgaged for 500*l.* to one Hunt, being devised subject to the incumbrances thereon, the devisee must take them *cum onere*, and be contented to pay off the mortgage.

Sir J. Jekyll said, the devise of the estate, subject to the incumbrance, was no more than what was implied; for the testator could not do it otherwise. When the testator devised other lands to pay his debts, that must be intended all his debts; consequently the debt by mortgage of Godalmin was part of those debts, which were to be paid off out of the money arising by the sale of the trust estate. This was the stronger by the testator's having appointed the rents and profits, during the infancy of his god-daughter, to be paid to the infant's father, for the sole use of the infant, which was as much as to say that they should not go or be applied in discharge of the mortgage; and although the infant by her own bill had submitted to pay off the mortgage, yet his honour said he must take care of her, and not suffer her to be caught by any mistake of her agent; wherefore the infant was directed to amend her bill.

The bill having been amended, and the cause coming on to be heard before Sir J. Jekyll, he declared that all the debts and general legacies of the testator were by his will to be paid out of his personal estate, and the real estates devised to the defendants, St. Eloy and Child; and that the mortgage of the defendant Hunt, on the estate devised to the plaintiff, was to be taken as one of those debts. This decree was affirmed by Lord King.

Bartholomew v. May. 1 Atk. 487.

17. A testator devised his lands at H. to Richard May in tail, remainder over. Those lands being then in mortgage for 1,300*l.*, he devised other lands to Thomas May, subject however to the payment of his debts, in case his personal estate, and other estates, devised for that purpose, should not prove sufficient to satisfy all his debts.

Lord Hardwicke decreed that the 1,300*l.* must be paid, as the debt of the testator, out of the personal estate; or if that should prove deficient, then out of the real estate so devised.

Tweedale v. Coventry, 1 Bro. Rep. 240.

18. Sir R. Worsley being seised in fee of several estates, subject to mortgages which he had made; and being also seised in fee of estates in the Isle of Wight, made his will, reciting himself to be seised of the estates, subject to incumbrances, and devised the mortgaged estates in strict settlement; and the estates in the Isle of Wight to trustees for 21 years, in trust to pay several annuities; after payment thereof, to pay all his bond and book debts, in case his personal estate should not be sufficient to pay the same, and also all his legacies and annuities; subject thereto, and such other payments as they should make to any other person, by virtue of or in pursuance of *any deed by him alone, or together with his son, executed.* He directed the trustees to account for all the remainder of the rents and profits of the premises so devised to them for the said term, to his cousins J. and R. Worsley.

Lord Thurlow decreed that the rents and profits of the trust term should be applied in discharge of the mortgages. He said he made his decree with great reluctance, from finding himself obliged to charge the trust term of 21 years with the payment of the incumbrances. Had the question stood upon the words, bond and book debts only, it might have admitted of

some doubt; but the misfortune was, that by the subsequent clause Sir Robert had directed his trustees to pay all his debts, annuities, legacies, &c.; and a still greater misfortune was, that he had made his executors, executors in trust, and had made the term a joint fund with his personal estate.

19. Where an estate in mortgage is devised, and another estate descends from the testator to his heir, the estate descended shall be applied in payment of the mortgage.

And also Lands descended.

20. A person being seised in fee of some lands which were mortgaged to A., who, about a month before the mortgage made, had taken a bond for the same debt, and having also a lease for three lives, devised the mortgaged premises, and the lease, to his wife, whom he also made his executrix. After his will made, he purchased the reversion of the estate which he held in lease, whereby the devise became revoked, as to those lands, and died without any republication or alteration of his will.

Galton v. Hancock, 2 Atk. 424.

Upon a bill brought by the heir at law for a delivery of the deeds and writings, and an account of the mesne profits of the estate descended to him, it was insisted for the wife, who was devisee of the mortgaged premises, that the personal estate being deficient, she might, as *hæres factus*, throw the burthen upon that part of the real estate descended to the heir at law, by the mere accident of her husband's purchasing the fee after the will made; who, being ignorant of the operation of law, intended her the benefit of all his real estate: that she should therefore hold the estate devised to her, free from any charge; and the heir to satisfy the mortgage out of the real assets descended to him: pretending that this was originally a bond debt, and the mortgage but a subsidiary or collateral security.

Lord Hardwicke was clearly of opinion that she had no right to be relieved against the heir; that the bond and mortgage were but one security given for one and the same debt; and that whether the estate descended to the heir by an omission of the testator to dispose of it, or from the devise being void, or from any other accident, it was still the same thing. He said that all the cases where the *hæres factus* had the assistance of the court to exonerate his estate, were against the representatives of the personal estate, thereby to put him on an equal foot with the heir at law, but not to give him the preference as in this case, where the competition was between one part of the real assets and the other: that this was the first instance wherein the heir was attempted to be charged: that the devisee must take the estate as it came to her, charged by the testator; and though, where but part of the estate was devised away, and the other part descended to the heir at law, the creditor might, upon his bond and covenant, sue the heir at law alone, without naming the devisee, yet that was because the descent was not entirely broke, as it was where the whole was devised away.

The cause was reheard; and Lord Hardwicke, after having taken a year to consider of it, changed his opinion, and gave the following judgement:—"the general question in this case is, whether the devisee be entitled to have the mortgage discharged out of the lands descended to the heir; and this may be divided into two questions: 1. Whether from the words of the will any intent can be collected to throw this burthen particularly on the heir or devisee. 2. Whether, upon the rules of this court for marshalling assets, the devisee has a right to have this debt discharged out of the lands descended to the heir.

MS. Rep.

" As to the first, it was insisted for the defendant, that the words of the introductory clause in the will, whereby he directs that all his just debts be paid, are sufficient to charge the whole estate; which would certainly hold in the case of creditors, if necessary to find a fund for their payment; which hath often been determined in cases less strong than the present, but are not sufficient to change the rule of marshalling assets, by transferring the burthen, as to the several persons claiming the testator's estate by devise or descent. On the other hand it was said, these introductory words shewed the testator did not mean to give his wife his whole estate, real and personal, free from his debts. But it would be strange to collect from such general words an intention to charge a devisee; especially in this case, where the whole was given to him; and that it is by accident only that he takes less than was intended him by the testator.

" As therefore no particular intent can be collected from the words of the will, the next question is, whether, according to the rules of this court for marshalling assets, the defendant be entitled to have the lands descended upon the heir, applied in exoneration of her mortgage, which is a new point, that has never yet been determined. I shall consider it in two lights: 1. How it would have stood between the heir and devisee, had this been a debt by bond or covenant, wherein the heir was bound, without any mortgage: 2. Whether the mortgage makes any difference in the case. At common law, before the statute of fraudulent devises, the devisee was not liable to pay debts, because the descent was broke, nor did equity differ from the rules of law, in making that assets here, which was not so at law, though it had been often attempted here, but could never be attained; there- Tit. 38. c. 1.

fore if, where the descent was broke in part, the heir was sued upon his ancestor's bond, before that statute, he had no remedy against the devisee, not so much as by contribution. Now, what is the consequence of 3 & 4 Wm. & Mary, c. 14. As to specialty debts; considering the question still abstractedly from the mortgage? the words of it are "that such creditors shall have their actions of debt against the heirs at law and such devisees jointly." So that the devisee is now made liable at law, and the action must be brought jointly against him and the heir. But what kind of judgement shall be given in such action? This is a new point not settled, which I shall endeavour to clear, though not quite material to the determination of the present case. It was contended on the part of the defendant, that there must be two judgements, one against the heir, and another against the devisee, where the heir has not assets sufficient; but this seems to me to be otherwise, for the action must be brought jointly, even where the whole estate is devised, and I think the intent of the statute was only to provide relief for the creditors at all events, by preventing any collusion or contrivance between the heir and devisee; so that if there be assets, whether descended or devised, the creditor must, by this joint action, necessarily succeed against one or the other. I ordered precedents of judgements on this statute to be searched for, but none can be found, because few actions have been brought at law upon this statute; as the parties may have a more complete remedy here. I can find but three in point, in none of which there is any judgement. One in Clift's Entries, 243, and the other two in Lilly's Entries, 145, 529, in all which the court charges the heir and devisee in the *debet* and *detinet*; just as where an action was before this statute brought against two heirs.

Now by the rules of law the judgement must follow the writ and count, consequently be against both jointly, as in the case of coparceners, where but one judgement is given; and if one be overcharged, he shall have contribution against the other, as is laid down in Sir W. Herbert's case, 3 Co. 13 *a*. In Davie v. Pepys, Plowd. 438, there is a precedent at large of a judgement against an heir, by which the lands are to be delivered to the creditor, to hold until he has levied the debt. Now, if this be so, the judgement cannot be such as contended for on the defendant's behalf; for if one judgement be given against the heir, for the creditor to hold the lands until satisfied; the debt, how great soever, may be satisfied by a long perception of profits; and there can be no reason for a second judgement against the devisee, as there is no time from whence such judgement shall commence; the creditor being to hold the lands recovered against the heir *in infinitum*, until satisfaction. If therefore the judgement at law must be joint against both, how does it stand in equity? There is no printed authority to determine this, only something similar started by the counsel, but not determined by the court, in Gawler v. Wade, 1 P. Wms. 99. as to contribution; but two cases not in print were cited to prove that the lands descended are first liable; Savill v. Savill, before Lord King, and Lord Conway's case, before me; to which I will add a third, that of Tynt or Pynt v. Raymond, heard by Lord Talbot 27 Jan. 1734: all which decrees I take to be right, and that the notion of contribution started by the counsel in 1 P. Wms. is not well founded. My reason for thinking those decrees right is, that as, before the statute, the devisee was not liable, that it was made in favour of the creditor only, in whose sole behalf it avoids the devise, but not in that of the heir, or any one else. So where

the descent is not totally broken, but lands descend to the heir, sufficient for payment of the debts, and no person is defrauded, it would be hard in a court of equity to make a devisee liable whom a testator never intended to charge, or to make him contribute to the heir for lands which were not meant by the testator to be subject to any part of his debts. My opinion therefore is, that was this only a specialty debt by bond or covenant, the lands descended must have been first charged.

"The remaining point, which indeed makes the difficulty of the case, is, that there being a mortgage on the devised lands, whether that mortgage shall be satisfied out of the assets descended. As to this, it is to be considered that a debt by mortgage, where there is a covenant and bond, is a debt by specialty, which all the assets are liable to pay. It is true the creditor may pursue his remedy against which he pleases; but this is only for his benefit, and no way concerns the question between the heir and devisee. By the old cases the heir has a clear right to have the personal estate applied to the discharge of a mortgage on his estate; this in conformity to the law, which gave many privileges to the heir, as sitting in his ancestor's place, and bound to do his services to the public; and gave some of these privileges even in the king's case, as by *Magna Charta*, c. 8. where the king grants that he will not seize the debtor's lands, so long as he has chattels sufficient, 2 Inst. 18, 19. Nor were lands originally liable to a private person's debts, nor any execution but by *fieri* or *levari facias*; which last, though it mentions *de terris*, yet means no more than the corn and other present profits of the land; Sir Wm. Herbert's case, 3 Co. 12 *a*. 2 Inst. 294. And when lands were made liable by Westm. 2. c. 18., this could only mean lands descended, as lands were not devisable at

Tit. 14. § 1.

common law. From this it was that courts of equity stepped in, in favour of the heir; and as before Westm. 2. the ancestor's personal estate was only liable in his hands, so did they give the heir the privilege of laying the load upon the personal estate, as the most proper fund for discharging the ancestor's debts. But this was at first personal to the heir, and it was long before it was extended to the devisee, or *hæres factus.* For in Cornish v. Mew, 27 Cha. II. 1 Chan. Ca. 271. it was refused to a devisee; but by whom, whether the Master of the Rolls and some Judge, is uncertain. For though this was in Lord Nottingham's time, yet I do not think it was done by him, because I find by a manuscript of his, that before that time, in Mich. 25 Cha. II. he had determined otherwise in a case of Mason v. Cheney. Then it was confined to a general devisee, or *hæres factus,* upon the same ground as in the case of the heir, such devisee standing in the heir's place; but was afterwards farther extended, by the same chancellor, to a particular devisee, in Popley v. Popley, 2 Chan. Ca. 84. and 1 Vern. 96. where I understand the words *ordinary devisee* as meaning a devisee of particular lands. The opinion of this great man has been followed ever since, and that on another reason, besides those drawn from the old law; which is the testator's intent to give the estate to the devisee, free from any charge which might in its consequences frustrate that gift. Now suppose there be simple contract creditors, and the personal estate is applied towards payment of specialties; they shall stand in the place of the specialty creditors, for so much as is drawn out of the personal estate, and receive satisfaction out of the lands descended; which is no more than the original creditors could have done. The lands descended are therefore (if the personal

assets be insufficient) the primary fund for payment of debts; and this I say on the authority of those cases of Savill v. Savill, and Lord Conway.

"It was objected that the testator's intent is declared by an act of his own in his lifetime, that of the mortgage, whereby he has created a specific lien on the lands devised, and declared that they shall bear this burthen, and that this was the party's own contract. But this contract was only between him as debtor, and his creditor, not between him and his heir or devisee; for with them he never contracted; and it has never been admitted in a court of equity, that a man, by making a mortgage, intends the mortgaged lands to be the primary fund for payment of the mortgage money; if it had, the court would never have decreed payment out of the personal estate in the first place. It was said, indeed, the case is different with respect to the real estate, but no authority was cited for this; and though the mortgage be a pledge and security to the creditor, yet it leaves the representatives of the mortgagor where they were, without determining the question between the heir and the devisee. If a specialty creditor shall go first against the lands descended, before he affects those devised, which is done, not for the benefit of the creditor, but of the devisee of the lands, why shall not the devisee have the same benefit, directly to exonerate his own lands, as he has in the other case by circuity?—that is, why shall he not have the same relief directly against the heir, by throwing the charge upon him, as where he throws the simple contract creditors upon him for so much of the personal estate as is exhausted by the specialty creditors, in case of a deficiency of personal assets? Legatees are entitled to stand in the place of specialty creditors, but this is only as to lands descended, as was deter-

mined by Lord Macclesfield in Clifton v. Birt, 1 P. Wms. 678, where he says expressly that a devisee of land is a specific legatee, and shall not be broke in upon, or made to contribute towards a pecuniary legacy. Now, if by this circuity of throwing the legatees upon the real assets, they are preferred to the heir, why shall not the devisee of the land be so too, especially when it is to comply with the testator's intent? There is another reason for preferring the devisee in this case, grounded upon the reason of the common law, which considers every devisee as a purchaser, and coming in by purchase; and an heir shall have no contribution against a purchaser, whether for a valuable consideration or otherwise. Sir W. Herbert's case, 3 Co. 12. In the case of Searle v. St. Eloy, heard at the Rolls, and afterwards before Lord King, there was a devise of lands, subject to the incumbrances thereof at the time of the testator's decease; and held first at the Rolls, and afterwards by Lord King, that the incumbrances should be first charged on the other lands, descended to the heir, before the devised lands.

"I have now done with the reasons and authorities that determine me to think this mortgage shall be discharged out of the lands descended. And shall proceed to take notice of some objections made on both sides. The first is what was said for the plaintiff, that this would tend to levelling all devises; that if a man had two estates, one mortgaged for a greater, the other for a less sum, and devised one to one person, the other to another, one of the devisees would be entitled to contribution against the other; for which was quoted, Carter v. Barnadiston, 1 P. Wms. 505. But I think there would be no reason for contribution in that case, the intent being equal; that as one devisee should have one part of the land, the other should

have the other part; nor is the case of Carter v. Barnadiston any authority to what is urged; for the several devises were not till after an express general charge for the payment of debts. The only other objection I shall take notice of was on the part of the defendant, which was this, that if the devisee was not to have the lands descended applied in discharge of his mortgage, then in case the mortgagor chose to take his remedy against the heir, he might have his remedy over against the devisee, which would be absurd, and against the testator's intent: and I think this was rightly argued; for whatever remedy the creditor pursues, does not alter the right of the parties; but the burthen must rest in its proper place; and this strange consequence would follow, that the heir would take from a devisee what was plainly and manifestly intended him by the testator.

"I have, after most mature deliberation, altered my opinion in this case, which I am not ashamed to own, since not to confess an error, is much worse than to err. The appearance of hardship against the heir struck me at first, but this hardship in a particular instance, must not prevail upon the court to break into its rules for marshelling assets: and though this may be called a new case, not strictly within any rule, nor warranted by any former precedent, yet must we remember that neither law nor equity consist merely of cases and precedents, but of general rules and principles, by the reason or which the several cases coming before courts of justice are to be governed, without distinction or exemption of any particular case, from hardships peculiar to it. But there is one circumstance in the present case which frees my mind from any uneasiness on account of hardship upon the heir, which is, that the charging the lands descended to him, will bring things nearer to the testator's intent,

the whole being intended to go to the devisee, and what has come to the heir is the mere effect of chance, the accidental revocation of the will by an act in law, the purchase of the reversion of one estate after the will made, and the testator's dying without any republication of it. I declare therefore that the former decree must be reversed, and that the devisee has a right to have the lands descended upon the heir applied towards satisfaction of the mortgage."

21. It is however in the power of a testator to exempt his personal estate from the payment of money due upon mortgage, by substituting his real estate in its stead. The personal Estate may be exempted.

22. I. S. devised all his manors to trustees and their heirs, upon trust, immediately out of the rents and profits, or by sale or mortgage of the premises, or any part thereof, to raise and levy money for payment and satisfaction of all his just debts; if there should be a surplus of lands or money, that to be to his sisters jointly, and their heirs; and gave all his personal estate to his wife, whom he appointed executrix. Bamfield v. Windham, Prec. in Cha. 101.

Lord Somers took notice that the debts were more than the personal estate amounted to; therefore the testator must have meant that his wife should have it exempt from debts, or he meant nothing; and there was in this case no room to make a different construction. Lemon v. Newenham, 1 Ves. 51.

23. A testator devised his real estate to be sold, and the money to arise from the sale to be applied to pay mortgages and other debts, the residue to be added to his personal estate. It was contended that these words were not sufficient to exonerate the personal estate; that in order to be so, there must be a destination, as to the estate to be sold, for the mere purpose of payment of debts; here was only a direc- Webb. v. Jones, 2 Bro. Rep. 60.

tion *in transitu*; for the words did not necessarily imply that the personalty was to be exonerated. The trustees were not under this devise bound to sell the estate immediately, yet the debts must be immediately paid; that must be out of the personal estate.

Lord Kenyon, M. R. said he had no doubt about the case: the general rules were very clear that the personal estate was the fund first liable; and that the testator could not exonerate it without substituting another fund. But there was no magic in words; no peculiar form of expression was necessary in order to exonerate the personal estate: If the intention of the testator was evident to exonerate the personalty, it must be exonerated; here the intention was beyond all doubt; the testator had directed the residue to be added to the personal estate; but according to the construction contended for, that would be gone.

Ancaster v. Mayer, 1 Bro. R. 462.

24. In a modern case Lord Thurlow laid down the following rules respecting this doctrine: —"1st. That the personal estate is liable, in the first instance, to the payment of debts. But in exception to this it is agreed, that the testator may, if he pleases, give his personal estate as against his heir, or any other representative, clear of the payment of his debts; and then it becomes a question, what is the mode of expression to give the personal estate, exempt from such payment; when the rule of law is, that such estate is first liable. Perhaps it might not have been unwise to have adopted the rule laid down in Fereyes v. Robertson, that the testator must use express words for that purpose: but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that where there is a declaration plain, that shall stand in lieu of express words: this rule has been laid down

Bunb. 301.

so long, and acted upon so constantly, that if other Judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore if there be a declaration plain, or manifestation clear, so that it is apparent upon the face of the will that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution: but should not such intention manifestly appear, there is not a single case which does not take it for granted, that the personal estate is by law the first fund for the payment of debts."

A specific Gift of a Chattel will exonerate it.

25. A specific testamentary gift of a chattel, will exonerate it from being applied in payment of money due on mortgage.

Oneal v. Mead, 1 P. Wms. 693.

26. A person being seised of a real estate in fee, which he had mortgaged for 500*l.*, and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died leaving debts which would exhaust all his personal estate, except the leasehold given to his wife. The question was, whether there being, as usual, a covenant to pay the mortgage money, the leasehold premises devised to the wife should be liable to discharge the mortgage.

Sir J. Jekyll, after taking time to consider of it, and being attended with precedents, decreed, that as the testator had charged the real estate by this mortgage, and on the other hand specifically bequeathed the leasehold to his wife, the heir should not disappoint her legacy, by laying the mortgage debt upon it, as he might have done, had it not been specifically devised: and although the mortgaged

premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere*, as probably they were intended.

The personal Estate not liable.

27. The rule that the personal estate shall be first applied in payment of mortgages, is founded on the principle that the debt was originally a personal one, and the charge on the real estate merely a collateral security; but where this principle fails, the rule does not take effect.

1. Where the Debt was contracted by another.

28. Thus where the debt was originally contracted by another, the personal estate of the owner of the descending lands, will not be applied in payment of it.

1 Salk. 450. 1 Ab. Eq. 270.

29. If a grandfather mortgages his estate, and covenants to pay the mortgage money; and the land descends to his son, who dies without paying off the mortgage, leaving a personal estate and a son; the intermediate son's personal estate shall not be applied in payment of the mortgage; for the debt was not contracted by him, and so his personal estate derived no adantage from it.

Though there be a covenant to pay it.

30. A covenant to pay a mortgage created by another person, will not make the personal estate of the covenantor liable in the first instance to the payment of the mortgage money; such a covenant being only considered in equity as an additional security, which does not alter the nature of the debt.

Bagot v. Oughton, 1 P. Wms. 347.

31. Sir E. Bagot married the daughter and heir of Sir Thomas Wagstaff, and for raising part of her portion, Sir T. Wagstaff mortgaged part of his estate for 3,500 *l.*, and died, leaving Lady Bagot his daughter and heir. The mortgagee wanting his money, Sir Edward joined in an assignment of the mortgage, and covenanted that he or his wife would pay the money; in consequence of which a question arose,

whether, by reason of this covenant, Sir Edward's personal estate should be liable to pay the same.

Lord Cowper declared, that this covenant by Sir Edward did not oblige his personal estate to go in ease of the mortgaged premises; forasmuch as the debt being originally Sir Thomas Wagstaff's, and continuing to be so, the covenant, upon transferring the mortgage, was an additional security for the satisfaction only of the lender, and not intended to alter the debt.

32. George Evelyn the father, in pursuance of a power, mortgaged an estate whereof he was tenant for life with remainder to his first and other sons, for raising 1,500 *l.* Evelyn v. Evelyn, 2 P. Wms. 659.

Upon an assignment of this mortgage, George Evelyn the son covenanted to pay the mortgage money. At his death it became a question whether his personal estate should be applied in payment of the mortgage made by his father, as he had covenanted to pay it.

Lord King, assisted by Lord C. J. Raymond, and the Master of the Rolls, was of opinion, that the personal estate of the son should not be applied to pay off the mortgage made by the father; forasmuch as the charge was made by George Evelyn the father, in pursuance of his power. That this being the original debt of George Evelyn the father, though his personal estate, if any such were to be found, would be liable thereto, yet the son's personal estate ought not to be charged with the father's debt: and notwithstanding that the son did afterwards, on the assignment of the mortgage, covenant to pay the mortgage money, yet since the land was the original debtor, the covenant from the son should be considered only as a surety for the land.

Shafto v. Shafto, cited 2 P. Wms. 664.

33. George Delaval, in 1722, mortgaged lands to W. C. to secure the repayment of 5,000*l.* with interest at five *per cent*; and by his will, made in 1728, he devised the lands to his nephew, G. Shafto, in tail male, remainder to the plaintiff in tail male, remainder over; and died soon after. In 1725 G. Shafto suffered a recovery to the use of himself in fee. The mortgagee calling for his money, W. Gibbons agreed to advance the 5,000*l.* at four *per cent.*, on an assignment of the mortgage: which was accordingly assigned to him, with a proviso for redemption on payment of the principal and interest at 4 *per cent.* And G. Shafto covenanted for himself, his heirs, executors, and administrators, to pay Gibbons the said principal and interest. In 1779 Shafto agreed to raise the interest to 5 *per cent.*, and by deed covenanted with the mortgagees, that the estate should remain as security for the 5,000*l.* with interest at 5 *per cent.*; and that he, his executors, &c. would pay such interest for the same. In January 1782, G. Shafto died, the interest on the mortgage being then in arrear for about 10 months.

The bill was brought, among other things, to have the 5,000*l.* and interest paid out of the personal estate of G. Shafto, or at least the arrear of interest due at his death, and the additional one *per cent.* charged by the deed of 1779. But Lord Thurlow was clearly of opinion, that the personal estate ought not to discharge the mortgage, the land being the primary fund. He also thought that the interest must follow the nature of the principal; and that the contract for the additional interest, turning upon the same subject, must be in the nature of a real charge.

Or a Charge on the real Estate.

34. Although a person should charge his real and personal estate with the payment of his debts; yet

this will not render his personal estate liable to the payment of a mortgage created by another.

35. H. Lawson being seised in fee by descent of an estate at Cramlington, in the county of Northumberland, and of other estates both freehold and copyhold, devised his estate at Cramlington, which was subject to a mortgage contracted by an ancestor, and also another estate, to be sold; charged the same, and also all his personal estate, with the payment of his debts; and devised the residue of his real estate in trust for his brother, in strict settlement. Lawson v. Hudson, 1 Bro. R. 58. 3 Bro. Parl. Ca. 424.

The question was, whether the personal estate of H. Lawson, the testator, was liable to the payment of this mortgage; and it was decreed by Lord Thurlow that the personal estate was not liable.

On an appeal to the House of Lords it was contended for the appellants, 1. That although a devisee of a real estate has generally no right to call upon the personal estate of the testator to disincumber the real estate devised, of any debts, not of his own contracting; yet where there were words in the will which showed the testator's intention that his personal estate should be applied, a court of equity would decree such application. 2. That in this case the testator's intention was clear, that this debt, as well as his own debt, should be discharged out of the fund he had provided, for the purpose of carrying the whole real estate, or what should remain of it, in the course of succession which he had prescribed.

On the other side it was said, 1. That by the established rules of equity, the personal estate of the testator, whose will does not require such an application of it, is not to be applied in favour of those who claim his real estate, for the purpose of exonerating it from debts not originally contracted by

such testator. Courts of equity distinguish between the debts of a testator and the debts of his estate. If the testator had received the money for which his real estate was pledged, his personal estate having received the benefit of the charge made upon the real estate, would in equity be liable to disincumber the real estate; but if the testator's ancestor created the charge, the testator's personal estate not having received any augmentation, at the expence of the real estate, could not in such a case be considered as a debtor to it; and this held equally whether the testator was seised in fee simple, or for a less estate, in the lands charged. This was the true principle of all the cases determined on the subject. The circumstance of the testator's having been personally liable was often mentioned, as the ground of decisions which have directed the application of personal estate in exoneration of real; but there were many cases in which courts of equity had refused to direct personal estate to be so applied, though the testator had entered into covenants, or other personal engagements, to pay the debt for which the real estate had been pledged by his ancestors, or those through whom he claimed. Each of these principles, however, would exempt the personal estate of H. Lawson from being applied towards discharging this mortgage upon the Cramlington estate, which was contracted by his father, unless the will of H. Lawson required it to be so applied.

2dly. There was no express mention made of the debt in H. Lawson's will, nor any clause that afforded a proof that he considered it as his debt. The testator created a fund for the payment of *his* debts, legacies, and funeral expences; but to apply that fund, or any part of it, in discharge of the mortgage debt, would

be to dispose of it for the payment of a debt which certainly was not *his* debt, in contemplation of law. The decree was affirmed. Tankerville v. Fawcett, 1 Cox. R. 237.

36. Where a person only purchases an equity of redemption, his personal estate will not be applied towards payment of the mortgage money. 2° Where an Equity of Redemption is purchased.

37. Thus it is laid down by counsel in the year 1681, as a doctrine fully established in Chancery, that where a person purchases an equity of redemption, in that case, although he purchases the land, subject to the debt due on the mortgage, and must hold the lands subject to such debt, yet *that* debt could never charge his person, nor did it in any sort become his own proper debt. Pockley v. Pockley, 1 Vern. 37.

38. John Aynesley purchased an estate from William Aynesley, which was subject to a mortgage for 2,000*l.*: not having paid it off, he devised the lands, together with other real estates, but subject nevertheless to the payment of all his debts, to his son, in strict settlement. Tweddell v. Tweddell, 2 Bro. R. 101.

The question was, whether the personal estate of John Aynesley should be applied in discharge of this mortgage.

Lord Thurlow said, this case was exactly the same with that of Rochfort v. Belvedere, 5 Brown's Parl. Ca. 299. where the House of Lords decreed that the personal estate was liable to the payment of the mortgage; but, notwithstanding, he said he was of a different opinion. The personal estate never was liable, nor was the party ever liable, to an action for recovery of the money; and therefore it ought not to be applied in payment of the mortgage. Ancaster v. Mayer, ante, § 24.

39. A covenant from the purchaser of an equity of redemption for payment of the mortgage money will not make his personal estate liable in the first instance.

Forrester v. Leigh, cited 2 P. Wms. 664.

40. Mr. Leigh, the testator, had purchased several estates subject to mortgages; with regard to one of which, he entered into a covenant for payment of the mortgage money, for the purpose of indemnifying a trustee; and as to another, which was a part only of an estate, subject to a mortgage, upon splitting the incumbrance, both parties covenanted to pay their respective shares, and to indemnify each other.

Lord Hardwicke thought these covenants would not have the effect of making the mortgages personal debts of the testator, they having been entered into for particular purposes; and declared his opinion accordingly in the decree.

Unless the Purchaser makes the Debt his own.

41. Where it appears to have been the intention of the purchaser of an equity of redemption to make the debt his own, there his personal estate will be applied in payment of the money due upon it.

Parsons v. Freeman, Amb. 115.

42. A person agreed to purchase an estate which was in mortgage for 90*l.*, of which he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the owner of the estate. The purchaser died, and the question was, whether the heir at law was entitled to have the money paid out of the personal estate of the purchaser.

Lord Hardwicke was of opinion that he was. 1st. It was an express contract to pay, and the representative of the mortgagor might maintain an action for the money; and so might the mortgagee oblige the mortgagor to let him make use of his name to recover the money. This was as strong a case as could well come before the Court.

2dly. It being agreed to be part of the purchase money, the heir would, if there was nothing more in the case, be entitled to have the money paid out of the personal estate, as where one articles to purchase an estate, and dies before the purchase is completed.

Waring v. Ward, 7 Ves. 332. E. of Oxford v. Rodney, 14 Ves. 417.

43. Where a wife joins with her husband in a mortgage of her estate, and the money is applied for the husband's benefit, the personal estate of the husband will be first applied in payment of the mortgage. Mortgage by Husband and Wife.

44. Lord Huntingdon and his first wife joined in a mortgage for a term of years of her estate for 4,500 *l.*, by the execution of a power of appointment, to pay for the place of captain of the band of pensioners, for Lord Huntingdon, who promised to repay the money out of the profits of the place, or otherwise. The mortgagee, together with the Earl and Countess, assigned the mortgage, subject to a proviso, that if the Earl or Countess, or either of them, should pay the money and interest, the term should cease. Huntingdon v. Huntingdon, 1 Ab. Eq. 62. 2 Bro. Parl. Ca. 1.

The Earl afterwards paid off the mortgage, and procured the term to be assigned to a trustee for himself.

The Countess died, and the Earl having married again, made his will, and devised the mortgage, with all other his personal estate, to his executors, in trust for his children by his second wife. The son of the first wife, who became Lord Huntingdon upon the death of his father, filed his bill to have the term assigned to attend the inheritance, which had descended to him from his mother.

Lord Keeper Wright declared he could not decree for the plaintiff, but upon the usual terms of redemption, on payment of principal, interest, and costs, and discounting profits.

The plaintiff appealed to the House of Lords, insisting that he was in effect decreed to pay the mortgage debt, which was wholly a debt of the late Earl, created to serve his particular occasions, and never was in any shape the debt of the late Countess, nor did any part of the money come to her use; besides Anno 1702.

the Earl covenanted, in the mortgage deed, to pay and satisfy the mortgage money and interest; and this covenant being in fact performed, the term ought not any longer to have been kept on foot, unless to attend and protect the inheritance, but not to charge it. That the appellant's mother being, at the time of making this mortgage, tenant for life, with remainder to the appellant in tail, and the premises being her own inheritance, the same ought not to be charged farther or otherwise than she agreed and consented: and it could not be imagined that she agreed to charge her land any otherwise, than to stand as a security for the money which her husband had occasion for, and was thereby enabled to borrow, and to be exonerated, when he, the principal debtor, should pay off the debt. But she never meant to make any absolute gift of so much money to her husband, or that her estate should stand mortgaged to him, or any in trust for him, for that, or any other sum. That it appeared by proof in the cause, that the Earl, in order to gain the Countess's consent to the mortgage, had promised that he would pay off the money, and discharge the land: but if the Earl had made no such promise, yet he ought not, in conscience, to be deemed a mortgagee or incumbrancer upon the estate, for having discharged his own debt, which he alone was liable to pay, and to be sued for by virtue of his covenant: and it was not agreeable either to reason or experience, that a principal debtor, merely by paying the debt he owes, should become a creditor, and charge his own surety with the payment of the debt, by any means or contrivance whatever.

On the other side it was contended, that the late Earl was no way compellable to discharge the land of his debt; nor did the Countess, when she agreed to

mortgage the premises for raising the 4,500*l.*, desire or insist on any covenant or agreement for that purpose; but, on the contrary, by the assignment of the mortgage, it was expressly agreed, that on payment of the 4,500*l.*, the term should be assigned to the Earl and Countess, or as they or either of them should direct. That the Earl was so far from intending to exonerate the land, by his paying off the mortgage money, that he not only took care to have the mortgage assigned, and kept on foot, but also considering himself as a creditor for the money so advanced, he constantly, after the death of the Countess, kept regular and exact accounts of his receipts and payments relating to the mortgaged premises. That it was certainly as lawful for the Earl to lay down the money, and take an assignment of the mortgage, as it would have been for any other person to have done; and therefore it was but reasonable that he should have the like benefit thereof, to reimburse what he paid for such assignment, as a stranger might have had: and since the Earl had thought fit to leave the money due on this mortgage, as a provision for his six younger children, who had very slender fortunes, and a narrow subsistence, it was hoped that there would appear no ground or reason to reverse or alter the decree.

It was ordered and adjudged, that so much of the decree as was complained of should be reversed, and that the premises in question should be discharged from the demands of the respondents, and the term assigned, as the appellant should direct.

45. Mr. Alexander and his wife, who was the daughter and heir of one Dayly, made a mortgage of the wife's estate. The husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs. Mr. Alexander,

Pocock v. Lee, 2 Vern. 604.

the husband, died, and made the defendant his executor, the wife surviving. After a decree to account,

The question was upon exceptions to the Master's report, whether the mortgage money should stand charged upon the land, or the land be exonerated out of the husband's personal estate. *Per cur.*—The husband having had the money, is in equity the debtor, and the land is to be considered but as an additional security; and so decreed it; according to the judgement in the House of Peers, in the case of Lord and Lady Huntingdon.

Tate v. Austin, 2 Vern. 689. 1 P. Wms. 264.

46. The wife joined with her husband in a fine to raise 400*l.* out of her own estate, for the use of her husband, to equip him as an officer in the army.

The question was, whether the husband's personal estate should be applied to exonerate the mortgage.

Per cur.—The wife subjected her estate to supply the wants of her husband; it must be taken to be a debt due from the husband, and to be paid out of his personal estate, if he be able; but all other debts should be first paid.

2 Atk. 384.

47. Lord Hardwicke has said—"Suppose a husband has a mortgage upon his estate, and a wife joins with him in charging her own; if she survives him, though her estate is liable to the mortgagee, yet in this court, her estate shall be looked upon only as a pledge, and she is entitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate."

48. But where money is borrowed on the wife's estate, partly to pay her debts, and partly for the husband's use, the husband will not be required to indemnify his wife's estate against any part of it.

Lewis v. Nangle, Amb. 150.

49. On a bill to have a sum of 1,100*l.* paid by the defendant, as having been borrowed by him on the

security of his late wife's estate. Lord Hardwicke said, the general rule was, that where the husband borrowed a sum of money for his own use, and the wife joined in a mortgage of her jointure for repayment of it, her estate should be a creditor on the husband for that sum. So it was where there was no settlement, and the wife mortgaged her estate of inheritance to raise money for the husband. But there was no instance where, at the time of such mortgage or security made, if at the same time a settlement was made either before or after marriage, that the husband was considered as answerable to the wife's estate, for the money borrowed; that was an exception out of the general rule; otherwise it would be very inconvenient to men that were going to be married, and nine times in ten contrary to the intention of the parties. Besides, in this case, the greatest part of the money borrowed was to pay off a debt due from the wife *dum sola;* and it was against equity to say that the husband ought to indemnify the wife's estate against that debt. The husband, it was said, was liable to the wife's debts contracted before marriage; and so he was; but if he was not sued in her lifetime, he was not liable even at law, unless she had a separate allowance, and left any thing behind her, which he possessed as her executor.

It was said, part of this money was paid to the husband and wife, not in order to discharge the wife's debts, but to the husband's use; that payment to the husband and wife was payment to the husband: the court would not however set up two presumptions, but adhere to one only. As the greater part was manifestly not intended to be accounted for by the husband, to the wife's estate, so he should take it that the rest was not. It was said the husband gave bond

for payment of the money, and performance of covenants; that the creditors might have sued him on this bond, and then he must have come as plaintiff into the Court of Chancery, to be repaid out of the wife's estate, which the court would not have done; and there was no more reason for it then; and he was of opinion the court would have relieved him. Therefore decreed the defendant only to keep down the interest, for life, &c.

50. If however it appear not to have been the intention of the wife to stand as a creditor for the mortgage money, the husband's personal estate will not be liable.

Clinton v. Hooper, 3 Bro. R. 201.

A bill was filed by the widow of William Clinton, to have her estate exonerated, by the estate of her husband, from a mortgage made by the husband and plaintiff, for which he received the money. The facts were, that in 1746 the plaintiff intermarried with William Clinton, who was then in indifferent circumstances, and received from her father a proper fortune. In 1762, she became entitled to some real estates, and in order to raise money for her husband, she joined with him in a mortgage of those estates. After the death of Clinton the plaintiff filed her bill to have her estates exonerated, to which the devisee of the personal estate and executor of her husband put in an answer, in which they contested the plaintiff's right, on the ground that it was a voluntary gift, by the plaintiff to her husband, in order to enable him to complete a purchase which had been made at her request; and that upon settling some accounts, the matter respecting the mortgage had been fully entered into, on which occasion the plaintiff admitted she had been advised to claim the mortgage money, but had relinquished that idea, and did not desire it, and pro-

mised to discharge the same, and accept the provision made for her by her husband's will.

Lord Thurlow admitted parol evidence of the wife's having relinquished this demand against her husband; and dismissed her bill. Innes v. Jackson, 16 Ves. 356.

51. Where an estate in mortgage was vested in a person for life, with remainder to another in fee, the rule formerly was, that the tenant for life should pay one third, and the remainder-man two thirds of the money due on the mortgage. But where the mortgage is not redeemed during the life of the tenant for life, the person in remainder cannot compel the representatives of the tenant for life to contribute towards the payment of the mortgage money. Proportions between Tenant for Life and Remainder-man. Ballet v. Sprainger, Prec. in Cha. 62. Clyatt v. Battison, 1 Ab. Eq. 117.

52. If a tenant for life of an equity of redemption pays off the mortgage money, and procures the term to be assigned to a trustee for himself; makes improvements, and dies, and afterwards the remainder-man comes to redeem; the representatives of the tenant for life shall have an allowance of two thirds of the lasting improvements, but nothing for the other third, because he received the benefit thereof during his life; nor will interest be allowed during the life of the tenant for life, for the money paid; for he was bound to keep it down during his life. Newling v. Abbot, 1 Vin. Ab. 185.

53. Where a person who is tenant for life of an estate that is mortgaged, pays off the mortgage money, his personal representatives will be entitled to call on the remainder-man for all the principal money so paid; but where a tenant in tail pays off a mortgage, the presumption is, that this was done in exoneration of the estate, unless the contrary appear. Where Tenant for Life or in Tail pays off a Mortgage. Tit. 3. c. 1. § 29. Tit. 2. c. 1. § 41.

54. A tenant in tail of an equity of redemption, under his father's will, paid off a mortgage secured Kirkham v. Smith, 1 Ves. 258.

on the estate, by a term for years, but did not procure an assignment of the term, and afterwards devised the lands. The remainder-man claimed the lands, the estate tail not being barred, discharged of the incumbrance.

Lord Hardwicke held, that there being a term for years in the mortgagee, which stood out in point of law, as it did before, no assignment in law having been made thereof, none of the parties before the court had the legal estate, for a conveyance of which the plaintiff came; therefore, *that* conveyance must be upon equitable grounds. So far as it appeared, tenant in tail paid it off with his own money: he might have taken an assignment of the term, either in trust to attend the inheritance, which would have ended the question, or in trust for himself, his executors or administrators; which would, notwithstanding the remainder over, have kept this incumbrance on foot for the benefit of his personal estate, and those entitled thereto: or he might have called for an assignment of it during his life, if he had discovered this limitation in remainder, that it might have been made for the benefit of his executors, not of the remainder: but his not doing any of these, clearly proved, that he conceived he had the absolute ownership of the estate; and the Court could not decree to persons claiming this, in contradiction to his apprehension and intent, a conveyance of the inheritance, and likewise of the term, without making a satisfaction to the personal estate of the tenant in tail; as that would be contrary to the maxim, that he who would have equity, must do equity.

The plaintiffs were decreed to have the estate, subject to the money paid by the tenant in tail, in discharge of the mortgage.

55. In all mortgages it is expressly stipulated that the mortgagor shall pay interest for the money borrowed. But in consequence of the statute 12 Ann. st. 2. c. 16. § 1. all assurances for the payment of any principal money to be lent, whereupon there shall be reserved above five *per cent.*, shall be utterly void. And Lord Hardwicke has said, that if a mortgage be drawn only for five *per cent.*, and the mortgagee takes six; it would be void upon the word *take*, in the statute. Of Interest. 3 Atk. 154.

56. By the statute 14 Geo. III. c. 79. it is enacted, that all mortgages which shall be made and executed in Great Britain, of or concerning any lands, tenements, hereditaments, &c. being in the kingdom of Ireland, or in any of the British colonies or plantations in the West Indies, to any of his majesty's subjects, and all bonds, covenants, and securities, for payment thereof, and the interest thereof, and all transfers and assignments thereof, shall be as good and effectual as if the same were made and executed in the kingdom, island, plantation, or place where the lands, &c. severally lie, at the rate of interest allowed in those places. Tit. 32. c. 26.

57. Interest on mortgages is due *de die in diem;* and therefore if a person be entitled to the interest of a mortgage for his life, with remainder to another; his executor will be entitled to interest up to the day of his death. Edwards v. Warwick, 2 P. Wms. 176.

58. It has been usual, where the interest of money lent on mortgage is reserved at the rate of five *per cent.*, to insert a proviso, that if it is punctually paid, the mortgagee will accept of four, or four and a half *per cent.*, which is allowed to be good; but where the interest reserved was five *per cent.*, with a proviso that if it was not paid within two months after Jory v. Cox, Prec. in Cha. 160. Strode v. Parker, 2 Vern. 316. Nichols v. Maynard, 3 Atk. 519.

it became due, it should be raised to five and a half *per cent.*, and the interest was not paid within the time, the Court of Chancery would not allow the mortgagee to recover the additional half *per cent.*; because it was in the nature of a penalty, and therefore relievable in equity.

Brown v. Barkham, 1 P. Wms. 652.

Halifax v. Higgins, 2 Vern. 134.

59. It is held in an old case, that where money was lent upon mortgage at five *per cent.*, and the mortgagor covenanted to pay six *per cent.* if he made default for the space of sixty days after the time of payment; the Court decreed that from default made he should pay six *per cent.*; the covenant being the agreement of the parties, was not to be relieved against as a penalty. And the same doctrine was held by the House of Peers in 1725, on an appeal from a decree of the Court of Chancery of Ireland. It does not however appear how a distinction can be made between the creation of a penalty by a proviso or by a covenant.

Burton v. Slattery, 5 Bro. Parl. Ca. 233.

Interest upon Interest not allowed.

60. It is a general rule that interest shall not be allowed upon interest; and that no agreement, entered into at the time when a mortgage is made, will be sufficient to make future interest principal.

Thornhill v. Evans, 2 Atk. 330.

61. A mortgagee compelled the mortgagor to agree that the interest should be turned into principal at the end of every six months.

Lord Hardwicke relieved the mortgagor; and said that interest was seldom allowed to be turned into principal, except upon the advance of fresh money; and even then, it was reckoned a hardship upon the mortgagor, and an act of oppression.

Exceptions: 1° Where a Mortgage is assigned. Ashenhurst v. James, 3 Atk. 270.

62. There are however several exceptions to this rule: 1° Where the mortgagee assigns over the mortgage to a stranger *bonâ fide*, with the consent of the mortgagor; all money paid by the assignee that was

due to the mortgagee, will be considered as principal; and the assignee shall have interest upon the interest then due, and paid by him, as well as upon the principal originally lent. Conway v. Shrimpston, 5 Bro. Parl. Ca. 187.

63. Where an account is regularly settled between the parties, and signed by them, it will carry interest; because in such a case there is an implied contract on the part of the debtor to pay. And all contracts to pay (says Lord Thurlow) undoubtedly give a right to interest from the time when the principal ought to be paid. 2° Where there is an Account stated. Brown v. Barkham, 1 P. Wms. 652. Boddam v. Riley, 2 Bro. R. 2.

64. Where an account is settled, between a mortgagor and mortgagee, by a Master in Chancery, pursuant to an order, and confirmed by the court, interest will be allowed upon what is due, from the time of such confirmation, even though part of it be in respect of costs. Or settled by a Master. Kelley v. Bellew, 4 Bro. Parl. Ca. 495. 2 Ves. 471.

65. Where the Court of Chancery enlarges the time for the mortgagor, that is a favour, as he would otherwise be foreclosed; and it is but just and reasonable that he should pay for it. 3° Where the Time is enlarged.

66. Thus where on a bill to foreclose, principal, interest, and costs were lumped into one sum by the Master; and it was held that if the mortgagor, or a puisne mortgagee, prayed longer time to redeem, they must pay interest for the whole sum. Neale v. Att. Gen. Moseley, 246

67. In the case of infants, interest is not generally allowed on interest. For one of the grounds upon which interest is turned into principal is, as a punishment on the mortgagor for the nonperformance of his contract, which ought not to operate against an infant, but where a benefit accrues to an infant, it is otherwise. Infants are excepted. 2 Vern. 392.

68. J. S. mortgaged his estate to the plaintiff and died, leaving the defendant his daughter and heir, Chesterfield v. Cromwell, 1 Ab. Eq. 287.

who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; the interest being suffered to run in arrear for three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it.

The account being admitted to be fair, it was held that though regularly interest should not carry interest, yet in some cases, and in some circumstances, it would be injustice if interest should not be made principal; and the rather in this case, because it was for the infant's benefit; who without this agreement would have been destitute of a subsistence.

Who are bound to pay Interest.

69. All persons seised in fee simple of lands which are in mortgage, are bound to pay the interest, and even a tenant for life may be compelled by the persons in remainder or reversion to keep down the interest of a mortgage.

Tit. 3. c. 1. § 30.

70. But where a person is tenant in tail in possession, and in receipt of the rents and profits, of lands which are mortgaged, with a remainder over; if the tenant in tail suffers the interest to run in arrear; neither the issue in tail, nor the remainder-man, can compel him to pay the interest incurred during his possession. For in such a case the courts of law, as well as those of equity, consider the remainder or reversion to be in the power of the tenant in tail. Nor will the personal estate of the tenant in tail be liable, after his death, to the payment of the interest accrued in his lifetime.

Chaplin v. Chaplin, 3 P. Wms. 235.

71. A person made a mortgage for years; then entailed the estate mortgaged on himself and the heirs

male of his body, remainder to his brother, and died leaving issue an infant son, who suffered the interest to incur on the mortgage for several years, and died just before he came of age, leaving a personal estate. Whereupon it was objected that the executors of the infant son, seeing their testator took the rents and profits of the estate, ought to keep down the interest; the rather for that he never had it in his power to bar the remainder by a recovery.

Lord Talbot said there was no precedent of a tenant in tail being obliged to keep down the interest on a mortgage: a tenant for life was without doubt compellable to do it; but as a tenant in tail had an estate which might last for ever, and the remainder over was not assets, nor regarded in law; and as such tenant in tail had a power over the estate, to commit any waste or spoil thereon, a court of equity had never enjoined him to keep down the interest. Wherefore he refused to make any order upon the executors of the tenant in tail, to pay the arrears of interest; though it appeared there was near 20 years interest due; and though the tenant in tail died during his infancy, and consequently before it was in his power to have barred the remainder by a recovery.

72. It was however determined in a subsequent case, that although a tenant in tail of full age was not obliged to keep down the interest of a mortgage, for the benefit of the remainder-man or reversioner; yet where an infant was tenant in tail of lands in mortgage, and his guardian or trustees were in the receipt of the rents and profits, he should be liable to the payment of the interest, as far as the rents and profits would extend.

73. Jane Pitt was tenant for life, with power to charge any sum not exceeding 4,000*l*, on the estate, Sarjeson v. Cruise, cited 1 Ves. 478. 2 Atk. 416.

which was limited to her son William Pitt in tail, remainder to the right heirs of his father. Jane Pitt charged the estate accordingly, and died. William Pitt died without issue, and under age, leaving the interest in arrear.

The court determined that W. Pitt being an infant, his guardian ought to have applied the rents and profits of the estate to keep down the interest; therefore what ought to be done by the guardian, should be considered as done; and consequently the real estate discharged, so far as the rents and profits in the life of the infant would go in discharge: but if that was not sufficient, it was to be an incumbrance on the remainder.

Amesbury v. Brown, 1 Ves. 477.

74. If a tenant in tail of land, or the husband of a tenant in tail, pays the interest of a mortgage on the estate tail, neither he, nor any person in his place, will be permitted to set up that as a fact undone; but the remainder-man shall have the benefit of it.

Mortgage Money is payable to the Executor.

Thornborough v. Baker, 1 Cha. Ca. 283.

75. In consequence of the principle that all mortgages are deemed part of the personal estate, it is now fully established that the money due upon mortgage is to be paid to the executor of the mortgagee, by reason of a rule of equity that the satisfaction should accrue to the fund which sustained the loss.

Winne v. Littleton, 2 Cha. Ca. 51.

76. Where a person having a mortgage in fee, devised all his lands and tenements to the plaintiff, and after giving several legacies, gave all the residue of his personal estate to (leaving a blank which he never filled up), whom he appointed sole executor. The plaintiff, as devisee of all the lands and tenements, claimed the mortgage money. But the administratrix insisted, that by the rule and course of the court, where lands were mortgaged, the money was accounted part of the personal estate, though the mortgage

was in fee; even where the money was made payable to the mortgagee and his heirs. That the personal estate being devised to the executor, was a good declaration that it should go to the executor, though void as a devise, for want of naming an executor, and consequently belonging to the administratrix. Decreed accordingly. Canning v. Hicks, 2 Cha. Ca. 187.

77. It has been stated, that in all cases of mortgages, the money borrowed is the principal, and the land the accessary: it follows, that when the debt is discharged, the interest of the mortgagee in the land ceases in equity, though the legal estate continues in him. ante, c. 2. § 41.

TITLE XV.

MORTGAGE.

CHAPTER V.

Of the Order in which Mortgages are to be paid; and the Means of gaining a Priority.

1. *Mortgages paid according to their Priority.*
5. *But not preferred to Statutes, Judgements, &c.*
7. *Legal Incumbrances preferred to equitable ones.*
9. *Where Possession of the Title Deeds gives Priority.*
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54. *Of Notice.*
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Section 1.

Mortgages paid according to their Priority.

WHERE there are several mortgages on an estate, they must be paid according to the priority of their respective dates; in pursuance of a rule adopted from the civil law:—*Qui prior est tempore, potior est in jure.*

2. Where a clause is inserted in a mortgage deed, by which the lands mortgaged are made a security for any farther sums which shall be advanced by the mortgagee, a subsequent loan will be considered as part of the original transaction, and will have a prio-

rity over a second mortgage, though subsequent to such second mortgage; and though the first mortgagee had notice of the second mortgage at the time when he made the subsequent loan.

3. A. mortgaged to B. for a term of years, to secure a sum of money already lent, and also such other sums as B. should afterwards lend or advance to him. A. made a subsequent mortgage to C. for a certain sum, with notice of the first mortgage; and then the first mortgagee, having notice of the second mortgage, advanced a further sum. The question was, upon what terms the second mortgagee should redeem the first mortgage. Gordon v. Graham, 7 Vin. Ab. 52.

Lord Cowper declared the second mortgagee should not redeem the first mortgage without paying all that was due, as well the money lent after, as that before, the second mortgage was made; for it was the folly of the second mortgagee, with notice, to take such a security.

4. Where there are several equitable interests affecting the same estate, they will also attach upon it, according to the respective times at which they commenced. It being a rule of the Court of Chancery, that equity follows the law. 2 P. Wms. 495.

5. Mortgages are however not preferred, in a court of equity, to statutes, judgements, or recognizances; but each of these securities takes place according to the priority of its date, in the same manner as in a court of law. But not preferred to Statutes, Judgements, &c.

6. Sir W. Bassett being seised in fee of several real estates, and indebted to several persons, by mortgages, judgements, and otherwise; deviséd all his estates to trustees, to be sold for the payment of his debts and legacies. Symmes v. Symonds, 4 Bro. Parl. Ca. 328.

Controversies having arisen among the creditors, concerning the priority of their respective securities, two suits were instituted in the Court of Chancery, where it was decreed that the money arising from the sale should be applied, in the first place, to pay the mortgages, and in the next place the judgement and statute creditors.

The persons whose judgements were prior to the mortgages appealed to the House of Peers, insisting that they ought to be paid their several debts according to the due course of law and equity; that their securities by judgement did in law affect the real estate, and the trust thereof, from the several days on which such judgements were signed, without the aid of the will; therefore ought to take place according to their respective priorities, as well on equities of redemption, as on legal estates; more especially in preference to mortgages which were not in being when those judgements were signed; which could not therefore take from the appellants any security that was before legally or equitably vested in them; or render their judgements in any degree less effectual than they were at the respective times of signing the same.

On the other side it was said, that the equity of redemption of the testator's estate was actually mortgaged, without notice of the judgements, and before the same were extended; that therefore those mortgages ought to be satisfied before them. That in a court of equity judgement creditors could only compel the sale of an estate of inheritance for their satisfaction; if that estate happened to be in mortgage, it was not reasonable that the mortgagees should be decreed to convey to a purchaser, without first receiving their money.

It was ordered that the appellants should be let into a satisfaction of their debts according to the priority of their several securities.

Legal incumbrances preferred to Equitable ones.

7. Where incumbrances are all merely equitable, a mortgage of the legal estate to a person who has no notice of such incumbrances, will give such mortgagee a priority over them. But if any of the equitable incumbrances are excepted, that circumstance will give them a priority over those that are not excepted.

Ingram v. Gibson, Mss. Rep. 1752. Amb. 153.

8. T. Gibson and Co. being scriveners, and having large sums of money of other peoples' in their hands, had lent Mr. Stiles, upon a mortgage of the manors of Bremhil and Cadenham and other lands in Wiltshire, several sums, which in 1743 were reported to amount to above 50,000*l.*, and those estates were then decreed to be sold for payment thereof. Before this, Gibson and his partners had given declarations of trust to several of their creditors, who had money in their hands, assigning them several parts of the mortgage money due by Mr. Stiles, and declaring themselves trustees for them according to their respective demands. These declarations of trust amounted originally to 27,900*l.*, of which 2,000*l.* was to be paid out of 8,500*l.* due to Gibson and Co. by Sir John Eyles upon the manor of Gidea Hall; and the remaining 25,900*l.* out of the money due upon Bremhill. Gibson and Co. were reported the best purchasers of Bremhill and Cadenham, the first at 50,000*l.* and the last at 10,000*l.*; this report being confirmed; by lease and release in 1744, Bremhill was conveyed to Gibson and Sutton, who were the surviving partners; Cadenham was conveyed to a trustee for them.

Gibson and Co. deing indebted by two severa bonds to Mr. Pelham in 23,500*l.* and interest, and to Mr. Winnington in 15,000*l.* and interest, by lease and release, in 1744, conveyed to Mr. Pelham and Mr. Winnington all their interest in Gidea Hall, which had been then lately conveyed to trustees to sell, for payment of the debt due to Gibson; and also conveyed to them the manor of Bremhill, and other lands which had belonged to the late Mr. Stiles, with a proviso for redemption upon payment of 23,500*l.* and interest to Mr. Pelham, and 15,000*l.* and interest to Mr. Winnington; but in the deed was contained an exception of an assignment and declaration of trust made by Gibson and Co. in October 1735 to John Witham for 7,000*l.* and interest, part of the money due to them from Stiles on the security of Bremhill; another to Sarah and Benjamin Lethuilier, of 18th February 1741, for 5,500*l.*, part also of that security; another to Hinde and Pickard, of 20th of February 1741, for 2,000*l.*, as part also thereof; another to Ashby, of 8th April 1742, for 2,500*l.* on the same account; another to Sarah Lethuilier, of 2d September 1742 for 2,000*l.* part of the money secured upon Gidea Hall.

The manor of Gidea Hall was afterwards sold, and Mr. Pelham in a great measure paid off out of the purchase money, as was also Sarah Lethuilier her 2000*l.*

T. Gibson died in 1744. Sutton, the surviving partner, being a bankrupt, and there being a considerable deficiency for payment of the creditors, the plaintiff, as executor to Mr. Winnington, brought his bill for a sale of Bremhill, and the other premises comprised in the mortgage of 1744, and to have the priority of such creditors as had any demands on the mortgaged premises settled.

It came out upon the answers of the defendants, that there were several other creditors who, previous to Mr. Pelham and Mr. Winnington's mortgage, had assignments and declarations of trust of and upon the mortgage money secured by Bremhill, most of which were prior in time to those excepted in Mr. Pelham and Mr. Winnington's mortgage.

The question made between the defendants was, whether the excepted and unexcepted creditors, being all but equitable incumbrancers, under their several declarations of trust from Gibson and Co. were not to be satisfied according to their several priorities; or whether those excepted had not gained a preference, by the notice which Mr. Pelham and Mr. Winnington had of their demands; for Mr. P. and Mr. W. having the legal as well as an equitable estate in them, it was allowed that, till after they were satisfied, nothing more could be drawn from them than the sums excepted in their mortgage.

Lord Hardwicke. — The bill is brought by the plaintiff, as representative of Mr. Winnington, for a satisfaction of his demand out of the mortgaged premises, and if those not sufficient, out of Gibson's general estate. Next, to have the priority of the several creditors settled. In this arises a question between the unexcepted and excepted creditors, in the conveyance made to Mr. Pelham and Mr. Winnington; whether the exception of some of the creditors taken *sparsim*, and not as they stood in point of time, will give them any preference to those who were not excepted.

Mr. Stiles was seised of these two manors of Bremhill and Cadenham, and having borrowed upon a mortgage 50,000*l.* of Gibson and Sutton, scriveners, they, who lent their clients' money, gave

them security by declarations of trust, upon the security which they had themselves from Mr. Stiles. The declarations of trust thus given by them, amounted originally to 27,900*l.*, of which 2,000*l.* was part of a debt from Sir John Eyles, secured on Gidea Hall. Mr. Stiles being dead, Gibson and Sutton being reported the best purchaser of Bremhill and Cadenham, and having got in the legal estate in May 1744, they in June following convey these premises by way of security, to Mr. Pelham for 23,500*l.*, and to Mr. Winnington for 15,000*l.* payable on the 15th of December then next, in which security they except several declarations of trust upon, and assignments of, part of the mortgage money secured on Bremhill, amounting to 20,000*l.*; and one of 2000*l.*, secured upon the money due from Gidea Hall. Hence it is clear that Mr. Pelham and Mr. Winnington had notice of these incumbrances, but as clear that they had no notice of any other. After this Gibson dies, and Sutton becomes a bankrupt; now it is come to be a question between their creditors, excepted in Mr. Pelham and Mr. Winnington's securities and those not excepted; whether they all shall stand in their priority, in order of time; or whether those excepted have thereby gained any preference to the others. No case exactly similar to the present has been cited, and I wish that, all being equally fair and honest creditors, I could in this general shipwreck let them all in equally; but as the rules of the Court will not warrant me in so doing, one or the other set of creditors must lose.

The questions therefore are, 1st, How the right stood as between themselves before the conveyance to Mr. Pelham and Mr. Winnington? 2dly, What alteration was made by that conveyance?

As to the first, all the creditors being but equitable incumbrancers, and none of them having a better right to call for the legal estate than the other, the rule *Qui prior est tempore, potior est in jure*, must have place between them; and yet they had left in the power of Gibson and Sutton to give a preference to any one of them they pleased, even to the very last of them, by granting him the legal estate, who must then have been preferred to all the rest; for having got the law on his side, and equal equity with the others, this Court could not take the benefit of the law from him. Tit. 12. c. 3. § 33.

The next question is, whether the excepted creditors have gained any preference by that exception, which on the one hand is contended to be notice sufficient to Mr. Pelham and Mr. Winnington to make them trustees for such excepted creditors; and on the other, is said to be only a notice to them, that so much and no more was to be drawn out of their estate, but that they were no way concerned to whom the money drawn from them should be paid. I am sorry to say that the exception has the effect of making Mr. Pelham and Mr. Winnington trustees for the excepted creditors; because I heartily wish all the creditors could come in equally: but not having the power of making it so, the rule of the Court must take place.

The argument used for the excepted put the unexcepted creditors to a dilemma. We are, say they, prior to Mr. Pelham and Mr. Winnington, who are prior to you, consequently we must be prior to you too. Had this been a conveyance with a covenant from Mr. Pelham and Mr. Winnington to pay those creditors, it had been impossible to say that the other creditors should have any benefit of that covenant,

but Mr. Pelham and Mr. Winnington would have been not only trustees for, but debtors to, those whom they had so covenanted to pay; or had the conveyance been to trustees, to raise money by sale or mortgage to pay these creditors, and then to pay Mr. Pelham and Mr. Winnington, the legal estate being conveyed for their benefit, would have given them a preference. Now this conveyance, though by way of mortgage, to Mr. Pelham and Mr. Winnington, comes very near a conveyance to trustees to sell, as those creditors could only have remedy by a sale; for having no legal estate in them, a decree of foreclosure would have signified nothing to them, as foreclosure is of no effect but where the party foreclosing has the legal estate. The question therefore turns upon the rules of the Court as to notice, which binds the conscience of the party, as to the right of another party, whereof he has notice; and this Court always raises an implied trust from that notice. So Mr. Pelham and Mr. Winnington having notice of these excepted creditors, became trustees for them, and their conscience was bound as to those creditors' demands; but could not be so as to other creditors, of whom they had no notice. Upon the rules of the Court, therefore, I am of opinion that I cannot divest the excepted creditors of the right they have acquired by Mr. Pelham and Mr. Winnington's having notice of their demands.

Where Possession of the Title Deeds gives a Priority. Goodtitle v. Morgan, infra.

9. It has been laid down by the late Mr. Justice Buller, that where a second mortgagee is in possession of the title deeds, that circumstance will entitle him to a priority over the first mortgagee; because where a person lends money upon mortgage, without requiring the delivery of the title deeds, he thereby enables the mortgagor to practise a fraud upon a third

person. This rule is however much too general; as there are many cases in which the title deeds cannot be delivered up: it is therefore now settled, that nothing but a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee, to the mortgagor's retaining the title deeds, shall be a reason for postponing his priority.

Treat of Eq. B. 1. c. 3. § 4.

10. Thus where it appeared that the mortgagor got back the title deeds from the first mortgagee, upon a reasonable pretence, Lord Cowper dismissed the bill brought by the second mortgagee to postpone the first.

Peter v. Russell, 1 Ab. Eq. 321.

11. Mr. Fonblanque mentions a case, where it appearing that the first mortgagee had required, and was assured by the mortgagor that he had delivered to him all the title deeds; Lord Thurlow held, there must be a voluntary leaving of the deeds to entitle the second mortgagee to a priority.

Pinner v. Jemmett, Treat of Eq. B. 1. c. 3. § 4.

12. In another case Lord Thurlow held that a mortgagee of a reversion, who had not the title deeds, should not be postponed to a second mortgagee, whose mortgage was made after the mortgagor had come into possession, and who had got the title deeds; there being neither fraud nor gross negligence.

Tourle v. Rand, 2 Bro. R. 650.

13. One Basnett having deposited the title deeds of an estate in the hands of Plumb, to whom he was indebted, afterwards mortgaged the estate to Fluit, to whom he was also indebted. Basnett having become a bankrupt, Plumb filed his bill against Fluit for a sale of the estate, and to restrain the defendant from proceeding at law to recover possession of the premises.

Plumb v. Fluit, 2 Anstr. R. 432.

The circumstances of the transaction were disputed. The plaintiff endeavoured to fix the defendant with

actual notice of the deposits, and for that purpose read the testimony of Basnett, who swore that he had informed the defendant of the deposit of the title deeds, before the execution of the mortgage; and this evidence was admitted by the Court.

Lord Chief Baron Eyre said—The legal estate being in the defendant, the question was, whether the plaintiff could raise a trust upon his estate, so as to gain a priority for his own demand. It was fully settled that a deposit of title deeds, as a security for a debt, amounted to an equitable mortgage. If the plaintiff could prove actual or constructive notice of the deposit in the defendant, it raised a trust in him to the amount of that equitable mortgage. As to the evidence of actual notice, the testimony of Basnett alone, unsupported, and opposed, was too weak to found a decree, or even to direct an issue upon it. Swearing to the fraudulent intention of his own deed, he could expect little credit in a court of equity. A great deal had also been said about constructive notice, which he took to be in its nature no more than evidence of notice, the presumptions of which were so violent, that the Court would not allow even of its being controverted. Thus, if a mortgagee had a deed put into his hands, which recited another deed, that shewed a title in some other person, the Court would presume him to have notice, and would not permit any evidence to disprove it. The only reason that could raise in this case a notion of constructive notice was, that the deeds were not forthcoming. But was it possible that this circumstance could of itself be notice of the hands into which they were fallen, or the purpose to which they had been applied? At the utmost, it could only be a circumstance of evidence, to show that there was reason for

further inquiry; but being unsupported by any other circumstances, it proved nothing.

It was said, no man would advance money upon an estate without seeing the title deeds, unless with a fraudulent intention. He wished he saw, in a court of equity, some solid distinction established between a consideration which was an old debt, and a sum advanced *de novo*. There certainly was a great difference. In the one case the creditor jumped at any security he could get; he took the deed of conveyance, and trusted to get the title deeds afterwards. But till such a distinction was established, it was difficult to apply the reasoning which would belong to it.

The person who took the legal estate without the deeds, in a case like this, appeared to him, unless there was fraud, to be less blameable than he who took the deeds without the estate.

Upon all the circumstances, he could see nothing in the case that amounted to constructive notice.

With respect to the general question, the effect of leaving the title deeds in the hands of the mortgagor, the most intelligible rule, and, in his opinion, the most agreeable to justice, would have been to say, that if a man took, as his security for his mortgage, a single deed, and left the other deeds in the hands of the mortgagor, so as to enable him to commit a fraud, that he should in all such cases be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains were more or less, the mischief was the same. And if he had found the rule so laid down, he should have been perfectly satisfied. But it had been decided otherwise in the late cases; which established the rule, that nothing but fraud, or gross and voluntary negli-

gence in leaving the title deeds, would oust the priority of the legal claimant.

In the present case, all the negligence, or all the activity in the world, would have left the defendant in exactly the same situation in which he then was. He took his mortgage as the only security he could get: if it was already mortgaged, he was only where he was before. He seized it as a plank, to save something; for as a second mortgage it was worth nothing.

The plaintiff having therefore failed in making out his case, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill must be dismissed with costs.

6 Ves. 190. 14. In a subsequent case Lord Eldon said, "The doctrine at last is, that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgage. I agree with Chief Justice Eyre. I should have been glad to have found the rule established in the Court the other way; at the same time, allowance must be made for the cases put by Mr. Fonblanque, of joint-tenants and tenants in common, cases of necessary exception. All cannot have the deeds; therefore if the rule could be pressed to the extent to which Mr. Justice Buller carried it, those cases must be excepted, in which, from the nature of the title, the deeds may be honestly out of the possession. With that exception, such a rule would avoid a great deal of fraud in mortgage titles; upon which the observation arises, that no man can tell when he is perfectly secure. But there is no such rule."

15. It should, however, be observed, that where a second mortgagee has got possession of the title deeds, a court of equity will not take them from him, unless the first mortgagee pays him his money. Head v. Egerton, 3 P. Wms. 279.

16. If a person mortgages his lands by a defective conveyance, and afterwards mortgages them by an assurance that is good and effectual, to a person who has no notice of the defective conveyance, the second mortgage will prevail; because that carries the legal estate: and equity will not interfere, where both parties are equally innocent. A defective Mortgage not preferred to a second effective one.

17. Copyhold lands were mortgaged, but without a surrender; they were afterwards mortgaged to another person, and surrendered to him. Oxwick v. Plumer, 5 Bac. Ab. 43.

The Master of the Rolls, on solemn argument, dismissed the bill of the first mortgagee with costs, and held that equity would not supply the defect of a surrender against a person who came in by title, upon surrender of the same premises.

The case was re-heard before Lord Cowper, who was of the same opinion; and took this difference, that when there are two persons that have equal equity, then those that have the legal estate shall prevail; because there is no equity to take from such persons the title that they have gained at law.

18. But if a person mortgages his land by a defective conveyance, and there be subsequent debts, which did not originally affect the land, such as debts by bond, there the defect of such conveyance will be supplied, in equity, against incumbrancers who afterwards acquire a legal title to the land. For since the subsequent incumbrancers did not originally take the lands for their security, nor had an intention to affect them, when afterwards the lands are affected, and they come in under the person who was obliged in But will be preferred to Bond Debts, &c.

conscience to make the security good, they will not be allowed to stand in his place, but will be postponed to such defective conveyance.

Burgh v. Francis, 1 Ab.Eq.320. Finch. 28. 5 Bac.Ab.41.

19. Henry Francis, father of the defendant Henry, in consideration of 400*l.*, mortgaged the premises by feoffment in fee to the plaintiff's testator, but made no livery thereon, and covenanted for farther assurance. Henry Francis, the father, borrowed of Burgh, the testator, 77*l.* on bond, and promised that the mortgaged premises should be security for it. He afterwards made his will, and thereof appointed his son, Henry Francis, executor. Burgh died, and the plaintiff proved his will. The defendant, Henry Francis, confessed several judgements on bonds entered into by his father, namely, seven judgements as heir, and one as executor to his father. One of these seven judgements was obtained by Hayman, a defendant, in Hilary Term 1670, for 400*l.*; all the other judgements were entered about the same time.

The cause was heard by Lord Keeper Finch, assisted by Judge Wild, who declared, the Court was fully satisfied that the plaintiff ought to be relieved, and the said judgements ought not to incumber the premises, till the mortgage money was fully paid; wherein the Court did not ground its judgement upon the manner of obtaining the judgements, all in a term, and most of them together; nor on the special way whereby the heir charged the lands, by pleading *riens per descent;* but upon the true nature of the case. The Court declared, that the debt due upon mortgage did originally charge the lands, which the bonds did not, till they were reduced to judgements; and it ought not to be in the heir's power, by confessing judgements, to charge the lands in prejudice of that equity, the rather because of the covenant for farther

assurance. And though the mortgage was defective in law, for want of livery, yet equity, which supplied that defect, charged the lands; and though the creditors had no notice, yet they should be bound, because they were put in no worse condition than they ought to be, viz. to be postponed to the mortgage. Therefore it was decreed, that the defendant Henry, the heir, should convey to the plaintiff or her assigns in fee, redeemable on payment of 400*l.*, and the premises to be held quietly against the plaintiffs.

20. A. surrendered a copyhold estate, by way of mortgage, for money lent, but the surrender was not presented. A. became a bankrupt; his assignees were admitted to the copyhold, and brought their ejectment to obtain possession of it. The mortgagee brought his bill in Chancery to be relieved. The Court decreed a perpetual injunction in behalf of the mortgagee: for though it was said that the creditors of the bankrupt were equally valuable as the mortgagee, and having the title at law, they ought to be preferred; yet it was over-ruled, because the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; therefore when such creditors came under the bankrupt to charge the land, they ought to stand in his place, and come under the same obligation of conscience, to make good the defective security.

Taylor v. Wheeler, 2 Vern. 564. 1 P. Wms. 279.

21. The priority of payment, according to the date of each mortgage, or other incumbrance, may be lost by any fraud or artifice of the first mortgagee, in concealing his own mortgage, for the purpose of inducing another person to lend money on the same lands. For in such a case the Court of Chancery will give a priority to the subsequent incumbrancer.

Priority may be lost by Fraud.

Treat of Eq. B. 1. c. 3. § 4.

Draper v. Borlace, 2 Vern. 370.

22. A person who was a counsellor, having lent 8,000 *l.* to A., upon a mortgage in fee of a manor, and on a statute, in the penalty of 16,000 *l.*; was afterwards consulted by B. as to a loan of 2,000 *l.* to A.; encouraged him to lend the money, and drew the mortgage deed, in which he inserted a covenant, that the estate was free from incumbrances.

Decreed that B., the second mortgagee, should have a priority.

Berisford v. Milward, 3 Atk. 49.

23. A mortgagee was present when the mortgagor was in treaty for the marriage of his son with the father of the lady; and the lands, which were in mortgage, being agreed to be settled upon this marriage, to the intended husband for life, remainder to the wife for life, remainder to the issue of the marriage; it was not opposed by the mortgagee, who fraudulently concealed his mortgage, and at the same time privately assured the father of the young man that he would trust to his personal security.

Decreed that the son, and the issue of the marriage, should hold the lands quietly against the mortgagee and his heirs.

24. But where the party to whom the fraud is imputed was not conusant of the treaty, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the fraud, this principle does not apply.

Ibbotson v. Rhodes, 2 Vern. 554.

25. Thus if a person, intending to advance money on a mortgage, applies to a prior incumbrancer to know whether he has any charge on the estate on which he intends to lend his money, and he denies that he has any charge, he will thereby lose his priority. But the person intending to advance the money, or his agent, must inform the prior incumbrancer that he intends to lend money on the lands;

Pasley v. Freeman, 3 Term. R. 51.

for the prior incumbrancer is not bound to answer, unless he knows of such intention; as the question may be asked merely to satisfy an impertinent curiosity. Pearson v. Morgan, 1 Bro. R. 63. 2 —— 388.

26. It was formerly held, that if a mortgagee was witness to a second mortgage deed, it would gain a priority to the second mortgagee. In a subsequent case, Lord Hardwicke is reported to have said, he did not think the bare attesting a deed by a person as a witness, would create such a presumption of his knowledge of the contents, as to affect him with any fraud; for a witness is only to authenticate it, and not to be privy to the contents. And in a modern case Lord Thurlow said, "I do not leave this as a case which I should determine in the same manner; for a witness, in practice, is not privy to the contents of the deed." Mocatta v. Murgatroyd, 1 P. Wms. 393. Wilford v. Buzely, 1 Ves. 6. Becket v. Cordley, 1 Bro. R. 353.

27. It has been already stated, that if a purchaser, without notice of any incumbrance, obtains an assignment of a prior statute, judgement, or recognizance, to a trustee for himself, he may by that means protect the lands purchased from any mesne incumbrance. Now, as mortgagees are considered in equity as purchasers *pro tanto*, the same doctrine has been extended to them; and it has been long settled, that a mortgagee who has advanced his money, without notice of any prior incumbrance, may, by getting an assignment of a statute, judgement, or recognizance, protect himself from any incumbrance subsequent to such statute, judgement, or recognizance, though prior to his mortgage; that is, he will be allowed to tack or unite his mortgage to such old security, and will by that means be entitled to recover all monies for which such security was granted, together with the money due on his mortgage, before the prior mortgagees are entitled to recover any thing. Of Tacking subsequent to prior Incumbrances. Tit. 12. c. 3. § 33. Tit. 14. § 120.

Higgon v. Syddal, 1 Cha. Ca. 149.

28. One Syddal granted a rent-charge to the plaintiff Higgon; afterwards mortgaged the premises to one Calamy. The assignees of Calamy, after his death, bought in a judgement precedent to the rent-charge. The plaintiff exhibited his bill to discover what estate the defendant claimed; and charged that Calamy had notice of the plaintiff's rent-charge, before his mortgage. The defendants pleaded the mortgage to Calamy; that afterwards hearing of precedent incumbrances, they bought in a legal title precedent to the plaintiff's, and offered, that if the plaintiff would pay all due on the mortgage, and on their new acquired title, to assign all to him; if he would not, they stood upon it, they ought not to discover what that estate was they had bought in; nor ought their title to be drawn under examination in equity. And by way of answer denied that, to their knowledge or belief, Mr. Calamy had any notice of the rent-charge when he lent his money.

On debate the plea was allowed by Lord Keeper Bridgeman.

Marsh v. Lee, 2 Vent. 337. 1 Cha. Ca. 162.

29. One English mortgaged the manor of Wishat for 1,000*l.*, afterwards acknowledged a statute to the mortgagee for 800*l.* He mortgaged the same lands some time after for 700*l.*, and lastly mortgaged them to one Lee for 200*l.* Lee had no notice of the former incumbrances when he lent his money; but having discovered the mortgage for 700*l.* he purchased in the preceding mortgage and statute. The question was, whether he should by that means protect himself against the mortgage for 700*l.*

Lord Keeper Bridgeman, assisted by Lord Ch. B. Hale and Justice Rainsford, held that Lee might make use of these incumbrances to protect his own mortgage, as he had both law and equity on his side;

for first he had the legal title, by having purchased in the preceding, mortgage and statute; secondly, he had equal equity with the mortgagee for 700*l.* by having lent his money without notice of any preceding incumbrance. Lord Ch. B. Hale observed that this point had been determined by the Court of Exchequer in one Shelley's case. Sir H. Finch, counsel for Lee, cited Primate v. Jackson, Grove v. Grove, and Mrs. Calamy's case; in all which the Court of Chancery had determined, that a purchaser, or a mortgagee for a valuable consideration, without notice, who took in a precedent incumbrance, should thereby protect his estate against any person who had a mortgage subsequent to the first, and prior to the last mortgage; although he had purchased in the incumbrance after he had notice of the second mortgage.

Wortley v. Birkhead, infra.

30. There were first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee hearing of the two former securities, bought in the first incumbrance, which was a satisfied judgement. It was strongly insisted on at the bar, that though the trade of buying in incumbrances had been formerly countenanced, yet it was in truth a thing against conscience, and contradictory to many established rules of law and equity.

Edmunds v. Povey, 1 Vern. 187.

Lord Keeper North said he wondered the counsel laid their shoulders to a point that had been so long settled, and received as the constant course of Chancery. It was true there had been strong arguments used against the unreasonableness of this practice; there might be likewise strong reasons brought for the maintaining of it; and so was at first a case very disputable: but being once solemnly settled, as it was in the case of Marsh v. Lee, he would not now suffer that point to be stirred.

Hasket v. Strong, Stra. 689.

Stanton v. Sadler, 2 Vern. 30.

31. The plaintiff was a jointress, the defendant was a mortgagee, subsequent to the jointure; and got an assignment of a statute, which was precedent to the jointure, but was satisfied, and extended it on the lands mortgaged. The bill was to set aside the extent, for that the statute was satisfied. Whether the statute being satisfied should protect the mortgage, or be set aside, without payment of the mortgage money, was the question.

The Master of the Rolls (Sir John Trevor) decreed, that upon the plaintiff's paying the mortgage money with interest and costs, the defendants should assign all their securities to the plaintiff; but would not set aside the extent, without payment of the mortgage money.

Holt v. Mill, 2 Vern. 279.

32. The plaintiff lent J. S. 600*l.* on mortgage; afterwards discovering that the estate was pre-mortgaged to the defendant, he got in an old satisfied incumbrance, and brought his bill to compel the defendant to redeem or foreclose. It was objected, that the plaintiff, as between him and the defendant, who was a purchaser, ought to have proved the actual lending and payment of the consideration money, and the producing the deed, or an acquittance was not sufficient.—*Sed non allocatur.*

A Judgement Creditor cannot tack.

Wright v. Pilling, Prec. in Cha. 494.

33. A creditor by judgement cannot, by buying in an old mortgage, tack it to his judgement, so as thereby to gain a preference to the judgement, over a subsequent mortgage; because a judgement creditor does not advance his money upon the credit of the cognizor's real estate.

Brace v. Duchess of Marlborough, 2 P. Wms. 491.

34. After a decree, which referred it to a Master to state the several incumbrances, and their priority, affecting the estate of Sir W. G., this case arose.—A puisne judgement creditor bought in the first mort-

gage, without notice of the second mortgage, when he lent his money on the judgement; the question was, whether this puisne judgement creditor should tack and unite his judgement to the first mortgage, so as to gain a preference on his judgement, before the mesne mortgage.

Sir Joseph Jekyll held, that if a judgement creditor, or creditor by statute or recognizance, buys in the first mortgage, he shall not tack or unite this to his judgement, &c. and thereby gain a preference; for one cannot call a judgement &c. creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re*, nor *ad rem*; therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgement is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body; and then, during the defendant's life, he can have no other execution. Besides, the judgement creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for land afterwards purchased may be extended on the judgement; nor is he deceived or defrauded though the cognizor of the judgement had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded or deceived, if the mortgagor before that time mortgaged his land to another.

That though the rule of equity had been so settled, it was not however without great appearance of hardship; for still it seemed reasonable that each mortgagee should be paid according to his priority, and hard to leave a second mortgagee without remedy, who might know, when he lent his money, that the

land was of sufficient value to pay the first mortgage, and also his own; to be defeated of a just debt by a matter *inter alios acta*, a contrivance betwixt the first mortgagee and the third, was great severity. But this had been settled, upon solemn debate, in the case of Marsh v. Lee; wherein that great man Sir Matthew Hale was called by the Lord Chancellor to his assistance. Though this was settled, there could be no reason to carry it farther, to a case not within the same reason; to a case where the lender of the money did not advance it upon the immediate credit of the land.

ante, § 29.

But a Mortgagee may tack a Judgement.

35. It is laid down by Sir J. Jekyll, in the same case, that if a mortgagee lends a further sum to the mortgagor upon a judgement or statute, he shall retain against a mesne mortgagee, till both the mortgage and judgement or statute be paid. Because it was to be presumed that he lent his money upon the statute or judgement, as knowing he had hold of the land by the mortgage; and in confidence ventured a farther sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon.

Morrit v. Paske, ante, c. 3. § 47.

Baker v. Harris, 16 Ves. 397.

36. It has been determined by Sir W. Grant, that where there was a first and a second mortgage, and the mortgagor became a bankrupt, the first mortgagee was entitled to tack a subsequent docketed judgement, though no execution had issued at the time of the bankruptcy.

Effect of obtaining a prior Term for Years.

Tit. 12. c. 3. § 33.

37. The nature of outstanding terms, and the distinction between terms in gross and terms attendant on the inheritance, having been already explained, it will be sufficient here to state, that where a second or third mortgagee, who advanced his money without notice of any prior incumbrance, can obtain an assign-

ment of an old term, to a trustee for himself, he will be thereby enabled to retain possession of the legal estate, till he is repaid all the money due on his mortgage.

38. Although a term has been assigned upon an express trust to attend the inheritance; yet if a subsequent incumbrancer gets an assignment of it to a trustee for himself, it will protect him against all mesne incumbrances; in the same manner as if it had been a term in gross.

Willoughby v. Willoughby, 1 Term. Rep. 763.

39. George Willoughby, the plaintiff Jane's husband, being seised in fee, subject to a mortgage term for years, on the 12th Nov. 1718, in consideration of, and previous to his marriage with the plaintiff, entered into articles for settling the estate to the use of himself for life, then for securing a jointure to the plaintiff Jane of 350*l.* per annum, remainder to the first and other sons of the marriage in tail male, remainder to George Willoughby in fee; and power to charge the premises, by deed or will, with 3,000*l.* for younger children's portions.

A settlement was made 24th March 1718, in pursuance of the articles; and 17th August 1718, the old term was assigned to Skylling and Popham, upon an express trust declared for George Willoughby, his heirs and assigns, *to attend* and wait upon the freehold and inheritance of the premises, and be subservient thereto. George Willoughby, 24th March 1750, made his will, and executed his power, by charging his estate with 3,000*l.* for his younger children; he died, leaving the plaintiff Jane his widow, the defendant Henry Willoughby his eldest son, and three daughters, and a younger son George, co-plaintiffs with the mother. The plaintiff Jane being entitled under the settlement to her jointure of 350*l.* *per*

annum, and Henry being tenant in tail, he suffered a recovery, declaring the use to trustees and their heirs, upon trust nevertheless for such person and persons, and such estate and estates, as he the said Henry Willoughby should by deed appoint; he borrowed 870*l.* of his mother, and by an appointment mortgaged the estate to her for 500 years. All this time the old term remained in Skylling and Popham; but 15 June 1752, Henry borrowed 800*l.* of the defendant Jeffrey Cripps, and for securing it, mortgaged the premises to Cripps in fee. The same day Skylling, the surviving trustee in the assignment of the old term to attend the inheritance, by the direction of the defendant Henry, assigned that term to the defendant Boote, in trust to protect Cripps's mortgage of the fee.

It appeared by evidence, that previous to the taking of this mortgage, and on that occasion, Cripps had full notice of the marriage articles; notwithstanding which he took a covenant in the mortgage deed from Henry Willoughby, that the premises were free from all incumbrances, except one indenture of assignment of the old term to the defendant Boote, and the said term, and the mesne assignment thereof in the said last assignment mentioned; but it did not appear that Cripps had any notice of the mortgage made by Henry to the plaintiff his mother.

The plaintiff Jane the mother, together with her daughters and younger son, brought a bill to have the benefit of her jointure under the marriage settlement; also to have a sale of the estate, subject to her 350*l. per annum*; and out of the money arising from such sale to be paid the arrears of her jointure, next the provision for her daughters and younger son, and then her mortgage of 870*l.*, and the other incumbrances in their order.

The defendant Cripps, the puisne mortgagee, submitted that the plaintiff Jane's jointure, and the younger children's portions, should be preferred: but insisted that his mortgage ought to be preferred to the plaintiff Jane's mortgage; the legal estate of the prior term being vested in the defendant Boote, his trustee; and he being a purchaser by his second mortgage, without notice of the first: on this principle that the legal estate of the term being in a trustee for him, he had both law and equity on his side, while the plaintiff Jane had only an equity as against the term.

Lord Hardwicke—"Two questions have been argued at the bar. First, a general question whether this term having been assigned to Skylling and Popham upon an express trust declared, to attend upon the freehold and inheritance, and be subservient thereto; the defendant Cripps could in equity have had the benefit of it, to protect his mortgage, both against the jointure, the younger children's portions, and the prior mortgage; even supposing he had no notice of them.

"Secondly, A particular question, whether the defendant Cripps having full notice of the marriage settlement, the jointure, and portion, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff Mrs. Willoughby, even as to her mortgage; or must come in only according to his priority in order of time.

"The first question depends upon three considerations:—1st. What is the nature of a term attendant upon the inheritance? 2nd. What kind of grantee or owner of the inheritance is entitled to the protection of such a term; or in other words, in whose hands such a

term shall be allowed to protect the inheritance? 3d. Against what estates, charges, or incumbrances, the protection arising from such a term shall extend?"

What Lord Hardwicke said respecting the two first of these points has been stated in a former title. The subsequent part of this excellent judgement shall therefore only be here transcribed.—"The third consideration is, against what estates, charges, or incumbrances, the protection arising from such a term shall extend? The answer to this question may, I think, be laid down very generally; against all estates, charges, and incumbrances, created intermediate between the raising of the term, and the purchase. But here I desire to be understood to take in all the qualities or requisites before laid down; valuable consideration, *bona fides*, and entire fairness in the purchase, freedom from notice, either express or implied, and the having of the first and best right to call for the legal estate of the term; all these must concur to warrant this protection. And here arises the distinction whereupon great stress was laid for the plaintiff in this cause, and which was much laboured. 1st. It was admitted that this will be so, where the old term is standing out in the original mortgagee or grantee of it, or his representatives, and has never been assigned to attend the inheritance; but that where it has been so assigned, upon an express trust, it shall attend the first limitations of the inheritance, and all the estates derived out of it; it shall protect them, as here the uses of the marriage settlement, and the subsequent purchaser, without notice, can no ways gain the benefit of it.

Tit. 12. c. 3. § 36.

"2dly. That where it is so assigned upon an express trust to attend the inheritance, it is become so annexed to that inheritance, that it cannot be severed from it,

but the argument is not well founded. It is an attempt to establish a new distinction between a term attendant upon the inheritance by express declaration of the trust, and a term so attendant b construction or judgement of a court of equity. No authority or precedent of this court has been cited to warrant this distinction; and the only case where any thing of that nature appears is to the contrary, I mean that of Oxwick and Brokett, in 1 Ab. Eq. 355. How authentic that report is I cannot take upon me to say, for the decree is not entered in the register's book, and the minutes are so imperfect, that nothing material can be collected from them; except that there was an assignment of a mortgage term to attend the inheritance in the case. Let us then examine the ground of this difference.

"First, It was urged that where a term appears to be assigned expressly to attend the inheritance, it is notice to a purchaser or mortgagee that there are some limitations of the inheritance to be protected by it; but I take this to be a mistake. It is notice of nothing but that there is an inheritance to be protected, and that the term is attendant; and it does by no means imply that the inheritance is settled, or bound by special limitations; for a satisfied term may be, and often is, assigned to attend an inheritance in fee simple, as well as fee tail, or an estate carved out by particular uses and limitations. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds, making out the title to the fee. In this respect it is just the same as where the trust to attend the inheritance is constructive or implied. Indeed if the trust be declared to attend the freehold and inheritance, as limited or settled by such

a deed, or to protect the uses of such a settlement, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it; and the purchaser is bound to find them out at his peril; and I look upon this to have been the ground of the mistake.

"Secondly, It was argued that a term expressly assigned to attend the inheritance is so connected with it, that it will go along with all the uses and interests devised out of that inheritance, for a valuable consideration. That where a new conveyance is made of it for a valuable consideration, the trust of the term will immediately follow it, and the trustee will become a trustee for the new use. That so it was here upon the first mortgage made to the plaintiff, Mrs. Willoughby, by the defendant her son; and the survlving trustee Skylling could not alter the trust. I agree that it will be so against the grantor in that new conveyance of the inheritance, and his heirs, and all persons claiming from him as volunteers, or with notice. So it is in all cases where the owner creates a new estate, use, or incumbrance, out of the inheritance, or a charge upon it; confesses a judgement or a statute staple, &c. The trust of an attendant term is affected with it, in like manner as the inheritance is, as against the grantor and his heirs; and the purchaser or incumbrancer will receive the benefit of it in this Court. But when a new purchaser for a valuable consideration comes in without notice, and with all the qualifications which I have before mentioned, and gets an assignment of the term, he comes in, in a different degree; and as he is innocent, and has paid or given the value, and has got the law with him, how can a court of equity take it from him,

without contradicting all their rules? This subsequent purchaser having no notice, stands as against the prior purchaser or incumbrancer, but in the common case.

"Thirdly, It was objected further that this is to sever the trust of the term from the inheritance, and to leave the title of the inheritance to go one way, and the trust of the term another way. That this was not in the power of the owner of the inheritance, after his first conveyance, nor of the trustee, nor of both joining together. It is not necessary here to enter into the discussion of all the cases wherein a term once attendant upon the inheritance may be disannexed, and be turned into a term in gross; it is certain that it may be done at any time by the absolute owner of the inheritance; and so it is admitted by Serjeant Maynard in his argument of the Duke of Norfolk's case: or it may be made to become a term in gross upon a contingency, according to the resolution of that case. But here is no question of severing or disannexing, for the defendant Cripps, the second mortgagee of the fee, claims the term as attendant upon the inheritance in him. In this Court, had he come in without notice, he must be considered as a purchaser of it *pro tanto*, by his mortgage. He contracted for the security of the inheritance, and paid his money for it, and though he had the misfortune, ignorantly and innocently, to take a defective title to that inheritance, still it is the thing he bought, and desires to protect. If this were otherwise it would prevent every puisne mortgagee or purchaser, who has got an assignment of an attendant term, from making use of it in his defence. The argument was enforced by saying that it will put it in the power of a trustee of such an attendant term to prefer which of several incumbrancers he pleases, by assigning it

over; and that this he can no more do, than a trustee to preserve contingent remainders can be allowed in this Court to join to destroy them. But this reasoning answers itself, for I take it to be just upon the same foot as the case of a trustee to preserve contingent remainders. If such a trustee join in a conveyance to a purchaser for a valuable consideration, and the purchaser has notice of that trust, the latter is affected with the trust, and shall be decreed to reconvey the estate to the old uses. But if the purchaser comes in *bona fide*, and has no notice, he shall retain the estate; but the trustee shall make satisfaction for his breach of trust, in destroying the contingent remainder. It is just the same here; if the puisne purchaser or mortgagee has notice of the prior purchase or incumbrance, he shall not avail himself of the assignment of the term, but shall be decreed to reconvey, or procure it to be reconveyed. If he had no notice he must retain it; but if the trustee who joined in the assignment, had notice of such prior purchase or incumbrance, his conscience was affected by the trust; it was a breach of trust in him, and he ought to be decreed to make satisfaction. This in my opinion is what equity would demand.

"To go a step further.—See to what an extent this doctrine would go, if it were once admitted. It would make the assignment of such an attendant term to a purchaser's own trustee, named on his behalf, to protect him against nothing. The trust arising from the attendancy is to protect against mesne incumbrances; that is to say, mesne between the creation of the term, and the assignment of it, or the use that is made of it. But if it be allowed that wherever there is a conveyance made, or a charge or incumbrance created upon the inheritance, for a valuable consider-

ation, that draws after it so much of the trust of the term (as it really does) and that therefore a puisne purchaser or mortgagee, without notice, taking an assignment of it, takes it still bound by the derivative trust, such puisne purchaser or mortgagee can never be safe; and whether he had notice or not is nothing to the purpose; for by this doctrine it is still open to all the prior incumbrances, in the one case, as well as in the other.

"There is but one thing behind, which deserves to be taken notice of under this head. It was said to have been the general rule amongst conveyancers in making marriage settlements, or conveyances upon purchases, where they found an old term assigned upon express trust to attend the inheritance, not to disturb it, or take any new assignment of it to trustees named by the purchaser, but to rely upon it as it is. I have inquired of a very learned and eminent conveyancer, and cannot find there has been any such general rule. If there had, I confess it would have been very material, as in my Lady Radnor's case. It is true that Mr. John Ward of the temple, who was considerable in that branch of business, has declared it to be his opinion, and he took it to be so. But how far he practised it, *non constat*; and if he did, it would not make a general rule, which is the point to be inquired after. To reduce it to reason, it must be taken with a distinction: where an old term has been assigned upon an express trust to attend upon and protect the inheritance, as settled by such a deed, or the uses of such a settlement, described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, be-

cause the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where the title deeds always are, or ought to be, taken in; for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him. Such instances as these may account for the practice in many cases, but cannot constitute a general rule.

"Much was said under the head of inconvenience, danger to marriage settlements, and to prior purchases fairly made. But the inconvenience which would arise on the other hand, of breaking in upon the rule, that a purchaser for a valuable consideration without notice, shall not be hurt in equity; or that a court of equity shall never take away the benefit of the law from him, will balance all those arguments, and be found to outweigh them. This rule in equity bears an analogy and conformity to several rules of the common law relating to collateral warranties, non-claims, and descents cast, which are only the wise inventions and decisions of the law, to protect and quiet possessions.

"From this reasoning I am clearly of opinion, upon the first point, that the defendant Cripps, the puisne mortgagee, would have been entitled in a court of equity to the benefit of this trust term to protect his mortgage, both against the marriage settlement and the plaintiff Jane's first mortgage, in case he had no notice of either.

"I may seem to stand in need of some excuse for being so long on this head, since at last my decree in this cause will not turn upon it, but merely upon

the second point. But it had been so much laboured at the bar, and appeared in itself to be of so great importance to titles, that I thought it necessary that my opinion upon it at least should be known; and that the Court by their silence might not be understood to countenance this new distinction, which had been set up.

"The second question is a particular one, and arises upon the special circumstances of this case; whether the defendant Cripps, having full notice of the marriage settlement, the jointure, and the portions, and consequently not being entitled to the entire absolute benefit of the legal estate of the old term, can be preferred to the plaintiff Mrs. Willoughby, even as to her mortgage; or must come in only according to his priority in order of time: upon this point I am of opinion that he must come in only according to his priority in order of time. My reasons are two.

"First, He has not the legal estate of the term in himself; nor has he, as this case is circumstanced, the best or preferable right to call for that legal estate. Secondly, I cannot say that he took his mortgage clearly *bona fide* in this case.

"Consider how the right would have stood as between the plaintiff Mrs. Willoughby's mortgage, and the defendant Cripps's mortgage, in case there had been no assignment of the old term to a new trustee for Cripps, but the legal estate had remained in Skylling, the surviving trustee in the first assignment, to attend the inheritance. In that case it would have been most plain that Mrs. Willoughby's mortgage should have been preferred. Wherever the legal estate is standing out, either in a prior incumbrancer, or in such a trustee as against whom the puisne incumbrancer has not the best right to call for the

legal estate, the whole title and consideration is in equity, and then the general maxim must take place, *qui prior est tempore, potior est jure.* And this is the last point expressly determined by Sir Joseph Jekyll in the case of Brace v. Duchess of Marlborough. His words are,—In this case it appears that a puisne incumbrancer bought in a prior mortgage, in order to unite the same to the puisne incumbrance: but it being proved that there was a mortgage prior to that, the Court clearly held that the puisne incumbrancer, where he had not gotten a legal estate, or where the legal estate was vested in a trustee, could then make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority. Those words, *in all cases where the legal estate is standing out,* must be understood subject to Lord Cowper's qualification and distinction; so standing out as that the puisne incumbrancer has not acquired the better or preferable right to call for that legal estate. Now this he has plainly not done here; for the defendant Cripps having full notice of the marriage settlement, before he took his mortgage, the plaintiff Mrs. Willoughby has the better and preferable right, even as against the defendant Alexander Boote, the new trustee, to call for the legal estate of the old term, to protect her jointure. She might, upon equitable grounds, demand it to be assigned to a new trustee for her; and when that was done, I think she might protect her mortgage by it. This brings the whole to be an equity, and subjects the case to the rule, *qui prior est tempore, potior est jure.* She might come for an injunction to restrain Boote from recovering the possession from her by ejectment, and compel the defendant Cripps to redeem her, in respect of the arrears of her

ante, § 34.

annuity, and then he must redeem her entirely. This is not so strong as the case of tacking a third incumbrance to a first, in order to squeeze out a second; because it goes only in support and preservation of the plaintiff's actual priority, her original prior equitable right, which she acquired by having the first mortgage.

"But I think this point is materially corroborated against the defendant by my second reason; which is, that he did not take his mortgage clearly *bonâ fide* in this case. It appears plainly to me, that he aimed at gaining an unfair advantage in the manner of taking his security. He had full notice of the marriage settlement, the jointure of 350*l. per annum*, and the younger children's portions. He knew all these to be prior incumbrances on the estate; and yet, in contradiction to this, and with his eyes open, he took an express covenant in his mortgage deed, that the premises were free from all incumbrances, except one indenture of assignment of the whole term to the defendant Boote, and the said term and the mesne assignments thereof in the said last assignment mentioned. This was plainly intended to conceal that full notice which he had of the marriage settlement; and in consequence thereof he has not admitted that notice by his answer in this cause, but has put the plaintiff upon the proof of it; and now it comes out by the proofs, in this strong light, that it appears to have been fully stated in the case laid before his own counsel, previous to the lending of his money. This is against conscience, and is a badge of an indirect and collusive intention.

"For these reasons, I am of opinion that the defendant Cripps wants, and stands divested of, two ingredients necessary to entitle himself in equity to

the protection of this whole term against the plaintiff that is to say, a clear *bonâ fides*, and the first and best right to call for the legal estate; and therefore that he can come in only according to the order of time, which is posterior to the jointure, the portions, and the plaintiff's mortgage."

11 Ves. 618.

40. The doctrine established in the preceding case, that a term which has been assigned, upon an express trust to attend the inheritance, may notwithstanding be severed from the inheritance, and assigned to protect a particular incumbrance, has been confirmed by a court of law.

Goodtitle v. Morgan, 1 Term R. 755.

41. R. Jones being seised in fee of several estates, demised the same in 1761 to Aubrey for 999 years, by way of mortgage. In 1768 this term, the money being paid off, was assigned to Lockwood; in trust for Jones, as to the manor of Penmarke, and to attend the inheritance; and as to the other lands, in trust for Lockwood and Morris. In 1767 Jones mortgaged to Morgan, and in 1769 to David: both these mortgages were in fee. In 1769, Jones having borrowed 10,000 *l.* from Sprigg, assigned the term to Moreland, in trust for Sprigg; and by indentures of lease and release mortgaged the same lands in fee to Sprigg, to secure the 10,000 *l.*

On the mortgage to Sprigg all proper searches were made for incumbrances; he had all the title deeds that could be found delivered to him, at the time when he advanced his money, except the demise of the term for 999 years, and the assignments of it, which were kept in the hands of Lockwood, on account only of containing other premises in mortgage to Lockwood, which were not included in the mortgage to Sprigg, nor assigned to Moreland his trustee; but counterparts of them were then delivered to

Sprigg. Morgan and David were in possession, by ejectments brought on their several mortgages. The personal representatives of Morland, the trustee of the term for Sprigg, brought an ejectment for the recovery of the lands.

On the part of Morgan and David, it was contended, that the term must be considered as attendant upon the inheritance; consequently, at the times of the respective mortgages to them, the trustee of the term became their trustee, and the term could not be separated from the inheritance, but by their consent; that if previous to the conveyance to Sprigg in 1769, Morgan and David had brought ejectments upon their mortgages, neither Jones, nor Lockwood his trustee, could have set up this term as a bar to their ejectments: then if Jones himself could not set up the term, it was absurd to say that those who claimed under him might; for they could not claim a greater estate than he had: then Jones having parted with the inheritance, had no power afterwards to make any appointment of it differently: his power was gone, though it were collateral, by the conveyance of the land.

Mr. Justice Ashurst said—No man ought to be so absurd as to make a purchase, without looking at the title deeds; if he was, he must take the consequence of his own negligence. If the first mortgagee had used ordinary precaution, he must have known that this term was then outstanding; if he did know of it, and neglected to take an assignment of it, that was enabling the mortgagor to commit a fraud, by mortgaging the same estate again; by this therefore he became *particeps criminis*, and must suffer for the consequences of the fraud; for the lessors of the

plaintiff claiming under Sprigg, who had got the legal estate, must be preferred.

vide ante, § 9. Mr. Justice Buller was of opinion, that the plaintiffs having the title deeds were entitled to recover.

Where a Declaration of Trust of a Term is sufficient.

42. A declaration of trust of a term for years in favour of an incumbrancer, is tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide*, and without notice, procures an assignment of it for himself. And the custody of the title deeds, respecting a term for years, with a declaration of trust of it, in favour of a second incumbrancer, is equivalent to an actual assignment.

Stanhope v. Verney, 1 Inst. 290 *b.* n. § 13.

43. Henry Sayer being seised in fee of certain estates, subject to an outstanding term of years in Rigby and Eyre, by indentures of lease and release, bearing date the 4th and 5th June 1732, conveyed them to Lady Dysart and her heirs, for securing the payment of 1,000*l.* with interest, and covenanted to produce the deeds respecting the terms of years. Afterwards Rigby and Eyre assigned the term to Cunningham and Clayton, in trust for Sayer, his heirs and assigns; and then Sayer, by indenture dated 19th December 1732, conveyed the same estates to Mrs. Nash, under whom Lord Verney claimed by way of mortgage, for securing to her 3,000*l.* and interest, with a declaration that Cunningham and Clayton should stand possessed of the term in trust for her; the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to Lady Dysart.

Lady Dysart brought an ejectment; Lord Verney defended, and set up the term, with a declaration of trust in favour of Mrs. Nash, under whom he claimed; this Lady Dysart brought her bill in equity.

The question was, which should be preferred, Lady Dysart who had the first declaration of the trust of the term; or Lord Verney, who had the subsequent declaration of the trust, but had the custody of the deeds?

Lord Northington held, that a declaration in trust, in favour of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer *bonâ fide*, and without notice, procured an assignment. And that the custody of the deeds respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was equivalent to an actual assignment; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him. *

How far an old Incumbrance will protect.

44. If the first incumbrance only extends to part of the estate comprised in the latter mortgage, it will only protect the part thus comprised; but if the first incumbrance extends to estates not comprised in the subsequent mortgages, the puisne mortgagee shall hold all the estates, till he is satisfied.

Bovey v. Skipwith, 1 Cha. Ca. 201. 1 Ab. Eq. 323.

45. A person mortgaged the manor and rectory of D. to A., then mortgaged the rectory to B. without notice of the mortgage to A., afterwards B. purchased in a precedent incumbrance, on both the manor and rectory.

The question was, when B. had received all the money due on the first security, whether he should receive any more profits of the manor, or only keep

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* Lord Loughborough has observed, 6 Ves. 184., that this doctrine has been weakened by some determinations at law, where a satisfied term has not been allowed to be set up in bar to a plaintiff in ejectment. But the law on that point has been since altered. Vide Tit. 12. c. 3. § 51.

the incumbrance on foot, to protect the rectory. This was argued before Lord Keeper Finch, in the presence of Wild and Twisden: the two judges held that B. should not receive the profits of the manor after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention. But the Lord Keeper over-ruled it, for that when he had purchased the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reasonable that the estate should not be taken away by the mesne incumbrancer in a court of equity, which by no methods could be evicted at law, unless the person who sought relief would do equity, and pay the whole money due on both securities.

Ascough v. Johnson, 2 Vern. 66.

46. It has been long established as a rule in Chancery, that where a mortgagee buys in an incumbrance, to protect his estate at law, on compositions, he shall be allowed the full money due on such incumbrances; and the same shall not be redeemed by the mortgagor, or his heir, till payment of all the money due on such incumbrances; without regard to the beneficial bargains and compositions made by such purchaser.

Darcy v. Hall, 1 Vern. 49. 2 Atk. 54.

47. A distinction has however been made in cases of this kind, between a stranger and a trustee or heir at law. For where a trustee or heir buys in an incumbrance, he shall be allowed no more than what he really paid for it, unless he bought it to protect an incumbrance to which he himself was entitled. But where a stranger who has an incumbrance on an estate, buys in another security, to protect his own, he shall not only hold till he has satisfied his own debt, and has reimbursed himself the money paid for the in-

cumbrance bought in; but even till he has received all the money and arrears of interest due on the security so bought in.

48. In the case of judgements or statutes, it is laid down by Sir Joseph Jekyll, that if a puisne mortgagee without notice, buys in a prior judgement or statute, and that judgement or statute is extended upon an *elegit*, at a value much under the real; the mesne mortgagee shall not make the puisne mortgagee, who has got in such judgement, account otherwise, or for more than the extended value; nor will the Court of Chancery give any relief against the judgement or statute, but leave the mesne mortgagee to get rid of them, as well as he can, at law. 2 P. Wms. 494.

49. With respect to the time when a second or third mortgagee may purchase in a prior incumbrance; it has been long established that this may be done at any time, even *pendente lite;* for it may happen that the second or third mortgagee does not discover the first mortgage, but by the proceedings in the suit. At what Time a prior Incumbrance may be got in. Hawkins v. Taylor, 2 Vern. 29. Turner v. Richmond, Id. 81. 2 P. Wms. 491. 1 Bro. R. 63.

50. But where a puisne incumbrancer after the bill brought, and after the first decree made, and after the report, got an assignment of an old judgement and mortgage, hoping thereby to gain a preference to his debt; the Court said,—The assignment being after the decree made, he should not profit by it, or change the order of payment, but must come in according to the order of time of his own incumbrance, without regard to the old judgement and mortgage which he got in after the decree and report. Bristol v. Hungerford, 2 Vern. 524.

51. A person bought in an old judgement, after a decree had been made in a cause in which he had been a party with other creditors, and the Master had been directed to inquire into the priority of their demands; he made claim before the Master to have it tacked to his mortgage, thereby to gain a priority, Wortley v. Birkhead, 2 Ves. 571. 3 Atk. 809.

as to which the Master refused to make any report, whereupon he filed his bill: one question was, whether he could tack the incumbrance, bought in after the decree, to his mortgage.

Tit. 12. c. 3. § 35. note.

Lord Hardwicke (after laying down the general doctrine as already stated) said, "that if a puisne incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit; for in Marsh v. Lee, there was a *lis pendens*, yet was not the party affected by it: and so, he took it, in general it would be, notwithstanding a *lis pendens;* because the principle upon which all the cases depend was this, that a man's having notice of a second incumbrance, at the time of taking in the first, does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third, that will affect him; for then no act that he can do will help him. Then a *lis pendens* is nothing but notice: an actual notice is certainly as good as that by a *lis pendens:* one notice is, in consideration of this Court, as strong as another. Nay, actual notice is stronger than that implied by a *lis pendens;* it will not therefore affect him. That was Marsh v. Lee and the other cases which he agreed to; but no case was cited wherein a puisne incumbrancer, a party in a cause, and a decree made in that cause for satisfaction of incumbrancers, according to their respective priorities, had taken in a prior, to tack to his puisne incumbrance, that he should be allowed to make use of that in any other shape than that original incumbrancer would be. He was of the same opinion as Lord Cowper was in the Earl of Bristol v. Hungerford, in general, and did think it would be most mischievous and pernicious if the Court should allow that doctrine of tacking to be carried to that extent. First taking it upon the terms of the decree, all these decrees,

ante, § 50.

where there were several incumbrancers before the Court, a sale directed, and every thing necessary to be done to clear the estate in order to that sale, proceeded on this foundation, that the rights of the parties were to be taken as they stood at the time of the decree, and therefore directed an inquiry into the priorities. What were those priorities? Such as they stood at the time of the decree; not that after that, the priority should be varied. The Master was only to inquire into the condition it stood in at the time of making the decree. It was very different from the case put for the plaintiff, of a decree to inquire as to a good title. Certainly where there was a contract for sale of an estate, difficulties to the title often happened, which must be cleared up afterwards; and then what was said for the plaintiff should be allowed: but the terms of these decrees were very different. Not to rest upon the niceties of the words of these decrees, the sense, reason, and justice of the case required it; for otherwise, where an incumbrancer on an estate which was affected with several incumbrances, brings a bill for satisfaction of his incumbrance, and all proper parties, and has a decree for it, as between himself and the owner of the equity of redemption; some of the incumbrances are prior, others posterior to his: if it is allowed that after such a decree is made, one of those defendants, who happened to be prior to him, should convey to another defendant who was puisne to him, it would shut out the plaintiff after the decree made, at which time the rights were to be considered. What would be the consequence? Nothing could lay a foundation for greater collusion and contrivance between the parties, to exclude each other, than such a liberty would, and to the great deceit of the plaintiff: for then a man shall lose his costs by such a proceeding; the

plaintiff having a right to his debt, principal, interest, and costs, according to the respective priorities, and that is the direction of the decree; and here was a sufficient fund according to his then right, to pay all that; but after that decree was made, two of these defendants may, by collusion, give a third incumbrancer more than his debt; and it may be worth while to do so, in order to exclude the plaintiff, who happens to be a second incumbrancer. It would be carrying securities to market in that manner whereby the purchaser of them should not only stand in the place of the party selling, but would acquire a new equity, which it would be mischievous to allow; he meant in general cases. This was just the same to persons incumbrancers who were not parties to the suit, but who would come in under the decree; for they must come in and submit to the same terms of that decree, though no parties; and therefore this judgement creditor of 1694, if they could not make a title without him, must have come in under the terms of the decree, to receive a satisfaction out of the purchase money; but shall not be suffered, after this decree made, to assign his judgement, so as to give a new right to the assignee of it, not only to receive his, but to increase the first incumbrance. That doctrine was contrary to the meaning of these decrees, and to the justice of the case; and would open such a door for traffic and marketing between creditors, as would induce mischief; and therefore it was not to be allowed.

"This was said to be an interlocutory decree, and like a decree *quod computet.* But why was it interlocutory? It was the judgement of the Court, and not in the nature of such a decree *quod computet,* which depended on a different reason. Therefore he never was clearer in opinion than upon this part of

the case, as to the general right. If the plaintiff could distinguish this from the case, that might be a different consideration; and that would depend on his manner of charging it: but this was his opinion upon the general right."

52. In the following case, it was determined by the Court of Chancery, and the House of Lords, that a third or other subsequent mortgagee, after a bill filed for sale of the estate, and payment of all the mortgages, to which the first mortgagee had put in an answer, and submitted that the incumbrances might be discharged according to their respective priorities, might buy in the first mortgage; and thereby gain a priority over the second and other mesne mortgages.

53. John Butler being seised in fee of some lands in Surrey, mortgaged them to five successive persons, and delivered the title deeds to the fifth mortgagee. Upon the death of the mortgagor, the second mortgagee filed a bill in the Court of Chancery against all the other mortgagees, praying that they might set forth their interest in the premises, and that the mortgaged premises might be sold, and the money applied towards the payment of all the incumbrances, in their just order. To this bill all the other mortgagees put in their answer: the first mortgagee submitted that all the incumbrances might be paid according to their respective priorities; and the last mortgagee insisted, that having the title deeds, he ought to be paid immediately. After all these answers had been put in, the last mortgagee purchased in the interest of the first mortgagee, and filed a cross bill, stating this matter, and that by means of the assignment from the first mortgagee, the legal estate in the premises was vested in him; therefore

Belchier v. Renforth, 5 Bro. Parl. Ca. 292.

he was entitled to what was due on his own mortgage, preferably to any of the intervening mortgages.

It was decreed by Lord Keeper Henley, that the lands should be applied, first, in discharge of all that was due to the last mortgagee, as well on account of the first mortgage, which he had purchased, as on account of his own mortgage.

On an appeal to the House of Peers, it was contended, that this decree was wrong, for the following reasons: 1. It was an established rule in equity, that as between incumbrancers, having only equitable securities, that incumbrancer, whose security was prior in point of time, should be preferred in payment. The reason was, that neither of them having a legal title, there could be no ground for a court of equity to take from a prior incumbrancer, that right which the former was possessed of, before the latter became an incumbrancer. In this view, as matters stood at the commencement of the first cause, and when the same originally came on to be heard, the appellants were entitled to be paid in preference to the respondent. 2. Though in common and ordinary cases an incumbrancer, who has the legal estate, shall be preferred in payment to one who is only an equitable incumbrancer; and this not only where he originally took the legal security, but where a subsequent equitable incumbrancer has obtained an assignment of such legal security, and this even so far as to enable him to tack his equitable incumbrance, to the prejudice of a former intervening incumbrancer; yet this held only where the conscience of the party was not affected by any circumstance of equity, nor his right restrained, qualified, or limited, so as to prevent his gaining such benefit of priority. In the present case, the defendant by his answer had submitted to

assign his legal security to the appellants, the plaintiffs in the cause, and that the estate should be sold, and all the incumbrances should be paid according to their respective priorities; after which he could not assign his securities to any subsequent incumbrancer; nor the respondent, who was a party in the cause, and had notice of the said submission, take the same with a safe conscience, to the prejudice of the plaintiff.

On the other side it was argued, that the decree should be affirmed, for the following reasons: 1. For that it was an established rule in equity, that a third mortgagee having lent his money without knowing of there being a second mortgage upon the same estate, may, by paying off the first incumbrancer, and taking an assignment of his interest to himself, hold the estate against the second mortgagee, till he shall be paid what is due to him upon both the mortgages. That it was near a century since that doctrine was, upon long argument and mature deliberation, first settled; and it had prevailed ever since without variation. So that a second mortgagee, when he lent his money upon an equity of redemption, knew (or what was the same thing in questions of property, must be understood to know,) that his security lay open to the hazard of a subsequent incumbrancer getting into his hands an assignment of the first mortgage, and being thereby postponed; and a subsequent incumbrancer, confiding in the notoriety and certainty of this rule, is induced to buy in the first incumbrance at a new expence. 2. The principle upon which this doctrine was first established, and had ever since prevailed was, that the third mortgagee having innocently lent his money, without knowing that the second had any claim upon the estate, had in conscience as good a right to be paid the whole money he had lent, as the

second mortgagee had to the payment of what he advanced; and having by the assignment of the first, got a right to hold the estate absolutely at law, and having the possession of the title deeds, without which the estate could not be sold, a court of conscience ought not to take from him his legal protection of an honest debt. That in this case the justice of the rule was strengthened, because the second mortgagee did not make use of the common precaution in transactions of this nature, that of taking care that the title deeds, which were then in the hands of the mortgagor, were delivered to him; from which neglect, two things resulted: 1. That he confided more in the integrity of the mortgagor, than in the real security of the mortgage; and, 2. That he left in the hands of the mortgagor the means of trafficking with the estate again, and of deceiving innocent incumbrancers, who would be justified in presuming that he, who had the possession of the lands, and the custody of the title deeds, had a right to the estate.

This rule of equity looked no farther than to see whether the third mortgagee had notice of the second mortgage, at the time when he first lent his money, for it was then that he became an honest creditor, and had a right to protect his debt: but he had no occasion to look for a protection till he thought himself in danger of being hurt; and therefore whether his danger was first discovered to him by the second mortgage being disclosed in a suit in equity, or by an extrajudicial means; as the honesty of the debt was not affected, his right of protecting it, and the efficacy of the protection, by buying in the first incumbrance, were not prejudiced; nor were they prejudiced by his having purchased the first incumbrance, after the incumbrancer had, in his answer to the appellants'

bill, submitted to a sale of the estate, and to an application of the money in discharging the incumbrances in their just order, and according to their priorities. First, because the submission, taken in its full extent, could only bind the right of the person submitting, and not that of subsequent incumbrancers: but the right of protection claimed by the third mortgagee was not claimed nor derived from the first, but arose from the situation of the last mortgagee, as soon as he got the legal interest in the estate, and attached originally in himself. Secondly, the submission to a sale would not have had that effect, though it had been made by the last mortgagee himself, much less when made by the first. For the rights of mortgagees were not altered by turning the mortgaged estate into money, since in such cases the Court would direct the money to be applied according to the rights of redemption; and if the second mortgagee had not a right to redeem the estate, without paying what was due upon the first and third mortgages, he would of course have no right to partake of the money, till their claims were satisfied. The decree was affirmed. *

Of Notice.

54. As the principal point upon which the doctrine of tacking subsequent to prior incumbrances depends is, whether the mortgagee had notice of the prior incumbrance, at the time when he advanced his money; it will be necessary to ascertain what circumstances constitute notice of a prior incumbrance.

Direct Notice.

55. Notice is either direct or constructive; direct notice is an actual and positive knowledge of a prior

* The effect of this doctrine, in mortgages of copyholds, will be stated in Tit. 37. c. 1.

incumbrance, regularly and formally communicated to the mortgagee.

2 Vern. 574. Gilb. R. 8.

56. A notice given to the counsel, attorney, solicitor, or agent of a mortgagee, is a sufficient notice to such mortgagee. But a notice of this kind must be confined to the same transaction: for notice in another transaction will have no effect.

3 Atk. 294.

Treat of Eq. B. 2. c. 6. § 4. Le Neve v. Le Neve, Tit. 32. c. 28.

57. Where all the securities are prepared by the same person, notice to that person will operate as a notice to all the parties concerned in the transaction.

1 Cha. Ca. 36. 2 Atk. 275.

58. A judgement, though on record, is not in itself notice to a purchaser or mortgagee. For although a purchaser is, at law, bound to take notice of a judgement; yet, in equity, where the cognizee of a judgement claims to be allowed to extend his judgement against a purchaser, who has got a prior term or incumbrance, he must prove express or constructive notice of the judgement, otherwise he will not be relieved.

Tit. 32. c. 28.

59. A memorial of a conveyance, duly registered in the manner required by the register acts, is not of itself notice to a subsequent incumbrancer.

Hitchcock v. Sedgwick, 2 Vern. 157.

60. A person is not bound to take notice of an act of bankruptcy; for it may be committed in so secret a manner, as not to be easily known. But now, by the statute 46 Geo. III. c. 135., where a commission of bankruptcy is issued, or even a docket struck, these acts are made to operate as notice; if it shall appear that an act of bankruptcy had been actually committed at the time of issuing such commission, or striking such docket.

Constructive Notice.

Plumb v. Fluit, ante § 13.

61. Lord Chief Baron Eyre has defined constructive notice to be no more than evidence of notice, the presumptions of which were so violent, that the Court would not allow even of its being controverted.

And Mr. Fonblanque has observed, that it would be extremely difficult to extract from the cases any general rule on this subject. It seemed, however, to be held, that every man shall have notice of the instrument under which the party with whom he contracts, as executor or trustee, derives his power. It seemed also agreed, that where a purchaser could not make out a title, but by a deed which led him to another fact, he should be presumed to have notice of such fact. So, whatever was sufficient to put a party on inquiry, was good notice in equity. Treat of Eq. B. 3. c. 3. § 1.

62. It is laid down by Lord Eldon, in a modern case, that the possession of a tenant is constructive notice to a purchaser, of the actual interest he may have, either as tenant, or under an agreement to purchase the premises. Daniels v. Davison, 16 Ves. 249.

TITLE XV.

MORTGAGE.

CHAPTER VI.

Of Foreclosure.

1. *Nature of.*
5. *A Foreclosure binds an Entail.*
6. *How far Infants are bound by it.*
11. *Married women are bound by it.*
12. *Decrees of Foreclosure sometimes opened.*
13. *A Sale sometimes decreed.*

Section 1.

Nature of.

AS the courts of equity allowed persons who had mortgaged their lands to redeem them, long after the time of payment was passed, and the condition forfeited at law; it became also necessary to establish certain rules for enabling mortgagees to determine and destroy the right of redemption. This may be done after the day of payment is past, by the mortgagee's filing a bill of foreclosure; that is, by his calling on the mortgagor, in a court of equity, to redeem his estate presently, or in default thereof, to be for ever foreclosed, and barred from any right of redemption.

Booth v. Booth, 2 Atk. 343. 7 Term R. 185.

2. A mortgagee may bring an ejectment, at the same time that he has a bill of foreclosure depending. But special circumstances may arise, which will take the case out of the common rule, and induce the Court of Chancery to grant an injunction to stay the proceedings at law.

3. The Court of Chancery will not point out what title the mortgagee shall make on a bill to foreclose; but will decree him to make such title to the mortgagee as he is capable of doing. 2 Atk. 101.

4. In Welsh mortgages, where no precise time is fixed for redemption, there can be no foreclosure, although the mortgagor may redeem at any time. 1 Ves. 406.

5. Where an equity of redemption is entailed, a decree of foreclosure will bind all persons claiming under such entail. A Foreclosure binds an Entail.

6. A person having made a mortgage, afterwards settled the equity of redemption on himself for life, remainder to his issue in tail, remainder to his brother in tail. The mortgagee exhibited his bill against the mortgagor to foreclose, without making his brother a party, and obtained a decree for that purpose. Upon the death of the mortgagor without issue, his brother filed his bill to redeem. Roscarrick v. Barton, 1 Cha. Ca. 217.

The cause was heard before Lord Keeper Finch, assisted by Lord Chief Justice Hale, Wyld, and Wyndham. It was insisted for the defendant, that the deed under which the plaintiff claimed was voluntary: that although a voluntary conveyance would pass an equity of redemption, yet, in this case, where the plaintiff claimed an equity of redemption by way of entail, it ought not to be countenanced in equity, for the consequence would be, to make an equity of redemption perpetual.

Lord Chief Justice Hale.—"By the growth of equity on equity the heart of the common law is eaten out, and legal settlements are destroyed; and was of opinion there was no colour for a decree. In 14 Rich. II. the parliament would not admit of redemption, but now there is another settled course.

As far as the line is given, man will go; and if an hundred years are given, man will go so far; and we know not whither we shall go. An equity of redemption is transferrable from one to another now, and yet at common law if he that had the equity made a feoffment or levied a fine, he had extinguished his equity at law; and it hath gone far enough already, and we will go no farther than precedents in the matter of equity of redemption, which hath too much favour already; and concluded there should be no decree for the plaintiff: and a decree to foreclose a tenant in tail shall bind his issue in an equity of redemption, because that is a right only set up in a court of equity, and so may be here extinguished." The Lord Keeper concurred in opinion, and the bill was dismissed.

Reynoldson v Perkins, Amb. 564.

How far Infants are bound by it. 3 P. Wms. 401.

7. A decree of foreclosure may be obtained against an infant. But in all such decrees a day is given to the infant to show cause against it, within six months after he attains the age of 21 years. If he does not show any cause within that time, the decree is made absolute upon him: but he may upon motion put in a new answer, and make a new defence.

3 P Wms. 352.

8. In a case of this kind, though the infant has six months after he comes of age to show cause against the decree, yet he will not be allowed to open the account. Nor is he entitled to redeem the mortgage, by paying what is reported due; but is only permitted to shew an error in the decree.

Sale v. Freeland, 2 Vent. 351.

9. Where the validity of a mortgage depended on a disputable title, namely, whether the ancestor of the infant had properly executed a power from which his right to mortgage arose; the Court would not decree the infant to be foreclosed, till he came of age.

10. It has been determined in a modern case, that where a bill prayed a foreclosure against an infant, and the mortgagees consented to a sale, an inquiry should be directed whether it would be for the benefit of the infant. Lord Eldon said it would be too much to let an infant be foreclosed, when, if the mortgagee would consent to a sale, a surplus might be got for the infant. And if there was no precedent, he would make one.

Mondey v. Mondey, 1 Ves. & B. 223.

11. A feme covert is bound by a decree of foreclosure, and has no day given to her or her heirs to show cause against the decree, after the coverture is determined; for, having by her own act delegated her power to her husband, she must be liable to all the consequences of his neglect.

Married Women are bound by it. 3 P. Wms. 352.

12. The Court of Chancery has in some cases opened decrees of foreclosure; and allowed the mortgagor farther time to redeem his estate. But no general rule can be laid down in this respect, as every case must depend on its own peculiar circumstances.

Decrees of Foreclosure sometimes opened.

13. Where the estate mortgaged is reversionary, and in many other cases, the prayer of the bill is, that the estate may be sold, and the mortgagee paid his principal, interest, and costs; in which case, if there is a surplus, it goes to the mortgagor.

A Sale sometimes decreed.

Vide Perry v. Barker, 13 Ves. 198.

14. By the statute 7 Geo. II. c. 20. § 2. it is enacted, that where any suit shall be commenced by persons claiming under a mortgage, to compel the defendants in such suit, having a right to redeem, to pay the mortgage money, or to foreclose the equity of redemption; the Court, upon application of the defendant, having a right to redeem, and upon his or their admitting the right and title of the plaintiffs in such suit, may, before such suit shall be brought to a hearing, make such order or decree therein, as

might have been made in case such suit had been brought to a hearing.

15. By the fifth section of this statute it is provided, that it shall not extend to cases where the right of redemption is controverted, or the money due not adjusted; or to prejudice any subsequent mortgagee.

TITLE XVI.

REMAINDER.

CHAP. I.

Of the Nature and different Kinds of Remainders.

CHAP. II.

Of the Event upon which a contingent Remainder may be limited.

CHAP. III.

Of the Estate necessary to support a contingent Remainder.

CHAP. IV.

Of the Time when a contingent Remainder should vest.

CHAP. V.

Of Remainders limited by way of Use, and contingent Uses.

CHAP. VI.

How contingent Remainders and contingent Uses may be destroyed.

CHAP. VII.

Of Trustees to preserve contingent Remainders.

CHAP. VIII.

Of other Matters relating to Remainders.

CHAP. I.

Of the Nature and different Kinds of Remainders.

1. *Estates in Possession or Expectancy.*
2. *Remainders.*
8. *Vested Remainders.*
10. *Contingent Remainders.*
11. *Different Kinds of.*
29. *Exceptions to.*
30. *Limitation to A. for* 90 *years if he shall so long live.*
37. *Rule in Shelley's case.*
38. *Limitation to the right Heirs of the Grantor.*
39. *Heir sometimes a* descriptio personæ.
40. *What Kind of uncertainty renders a Remainder contingent.*
49. *An intervening remainder may be contingent, and a subsequent one vested.*
54. *Two contingent Estates in Fee may be limited in the alternative.*
61. *But no Estate after a Remainder in Fee can be vested.*
65. *Unless the Remainder be a contingent determinable Fee.*
67. *A Power of Appointment does not suspend Remainders.*
68. *Effect of a Contingency annexed to a preceding Estate.*
79. *Adverbs of Time only denote the Period when a Remainder is to vest in Interest.*
87. *A Contingency sometimes considered as a Condition subsequent.*

Section 1.

Estates in Possession or Expectancy.

WE now come to consider estates with regard to the time of their enjoyment, as they are either in possession or expectancy. Estates in possession are those where the tenant is entitled to the actual pernancy of the profits. Estates in expectancy are those where the right to the pernancy of the profits is postponed to some future period; and are of two sorts, remainders and reversions.

Remainders.

2. An estate in remainder may be defined to be an estate limited to take effect, and be enjoyed after another estate is determined. As if a man seised of lands in fee simple, grants them to A. for 20 years,

and after the determination of that term, to B. and his heirs, for ever. A. is tenant for 20 years, with remainder to B. in fee.

3. In the above case an estate for years is created or carved out of the fee, and given to A., and then the residue or remainder of the estate is given to B. Both these estates are however but one estate, the present term for years, and the remainder after, when added together, being equal only to one estate in fee. They are different parts, constituting one whole, being carved out of one and the same inheritance; they are both created and subsist at the same time, the one in possession, and the other in expectancy.

4. Lord Coke defines a remainder to be—"A remnant of an estate in lands or tenements expectant on a particular estate created together with the same, at one time." From which it follows, that whereever the whole fee is first limited, there can be no remainder in the strict sense of that word; for the whole being first disposed of, no remnant exists to limit over. Thus, if lands are limited to a person and his heirs, and if he dies without heirs, that they shall remain over to another, the last limitation is void. 1 Inst. 143 *a*. 1 Ab. Eq. 186.

5. A person devised lands in London to the prior and convent of St. Bartholomew, and their successors, so as they paid annually sixteen marks to the dean and chapter of St. Paul; if they should fail of payment, that their estate should cease, and the dean and chapter should have it. Held, that the remainder was void, because the first devise, carrying a fee, nothing remained to be disposed of. Dyer, 33 *a*.

6. In the case of a qualified or base fee, no remainder can be limited upon it. Thus Lord Coke says, if lands be given to A. and his heirs, so long as B. has heirs of his body, remainder over in fee, the 1 Inst. 18 *a*. 10 Rep. 97 *b*. Vaugh. 269. contra. Plowd. 235.

remainder is void. But since the statute *De Donis*, a remainder may be limited after an estate tail.

Bac. Ab. 8vo. Tit. Rem. B.

7. Lord Chief Baron Gilbert says, the word remainder is no term of art, nor is it necessary to create a remainder, for any other words sufficient to shew the intent of the party, will create it: because such estates take their denomination of remainders, more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word remainder, to make them such. Therefore if a man gives lands to A. for life, and that after his death the land shall revert and descend to B. for life, &c., this is a good remainder.

Vested Remainders.

8. Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed in future; and by which the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. As if A. be tenant for years, remainder to B. in fee; hereby B.'s remainder is vested, which nothing can defeat or set aside. So where an estate is conveyed to A. for life, remainder to B. in tail, remainder to C. in tail, with twenty other remainders over in tail, to persons *in esse*, all these remainders are vested.

9. The person entitled to a vested remainder has an immediate fixed right of future enjoyment; that is, an estate *in præsenti*, though it is only to take effect in possession and pernancy of the profits at a future period; and such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession.

Contingent Remainders.

10. A remainder is contingent when it is limited to take effect on an event or condition which may never happen or be performed, or which may not

happen or be performed till after the determination of the preceding particular estate; in which case, as will be shewn hereafter, such remainder never can take effect.

11. There are, according to Mr. Fearne, four kinds of contingent remainders: 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself. As if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over in fee; here the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen, therefore the remainder, which depends entirely upon the determination of the preceding estate by it, is contingent. Different Kinds of. 3 Rep. 20 *a*.

12. A fine was levied to the use of A. and the heirs male of his body, until the said A. should do such a thing, and after such a thing done by the said A., to the use of B. in tail. A. died without issue, and without performing the condition. It was adjudged that the remainder was contingent. Arton v. Hare, Poph. 97. Large's Case, 3 Leon. 182.

13. The particular estate may be circumscribed in its original creation, by being limited so as not to endure beyond a particular event, which may or may not happen during the period for which it would exist, if it were not so originally circumscribed. Fearne 5. 6th ed. *note*.

14. Thus in respect to an estate for years; if land be given to A. for 21 years, if B. shall so long live, and in case of the death of B. during the continuance of the term, to C. in fee; A. takes an estate for years, which will expire, either by its effluxion in B.'s lifetime, or by the previous decease of B. In the case proposed, it is intended that if the term expire by the death of B., C. shall have the land; but that if the Idem 6.

term expire by the effluxion of the years, B. shall not have the land. Now, while B.'s life and the term continue, it is uncertain in which of these modes the preceding estate will expire; the remainder therefore evidently depends on a contingent determination of the preceding estate.

Idem. 15. It is the same in respect to a life estate. If there be a feoffment to A. till B. returns from Rome, and on B.'s return from Rome to C. in fee, A. takes an estate which will expire on his own decease, or B.'s return from Rome, which shall first happen. In the case proposed, it is intended that if A.'s estate expire by B.'s return from Rome, C. shall have the land, but that if A.'s estate expire by his decease, C. shall not have the land. Now, while both A.'s life and B.'s residence at Rome continue, it is uncertain in which of these modes the preceding estate will expire, the remainder therefore evidently depends on a contingent determination of the preceding estate.

16. It is also the same in respect to an estate tail, which expires whenever there is a failure of issue inheritable to it. Now that failure of issue may take place at one particular time or another: if therefore land be limited to A. and the heirs of his body, and if A. die without leaving issue of his body, living at his decease, to C. in fee, the failure of issue of A. may take place either on the death of A. or at a subsequent time. In the proposed case, it is intended that if the estate tail expire in consequence of there being no issue inheritable to it at A.'s decease, C. shall have the land; but that if it expire in consequence of such issue's being alive at the decease of A., and afterwards failing, C. shall not have the land. Now, during A.'s life, it is uncertain in which of these modes the estate tail will expire: the remainder there-

fore evidently depends on a contingent determination of the preceding estate.

17. Where a testator devises to his wife for her life, if she shall so long continue his widow, and in case she marry, to A. in fee; there is ground to contend that A.'s remainder is contingent, as the estate of the wife may end in one of two ways, her death or her marriage; and the remainder to A. is expressed to take effect only on her marriage. But the courts have determined that it is merely an inaccuracy of expression, and that the intention of the testator is, that A. shall take in either event. They have therefore decided that A. shall take equally on the second marriage of the wife, and on her death without being married a second time.

Luxford v. Cheeke, 3 Lev. 125. Lady Ann Fry's Case, 1 Vent. 203.

18. The second kind of contingent remainder is where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder.

19. Thus Lord Coke says, if a lease for life be made to A. B. and C., and if B. survive C., then the remainder to B. and his heirs. Here the want of B.'s surviving C. does not affect the determination of the particular estate; nevertheless it must precede, and give effect to B.'s remainder; but as such an event is dubious, the remainder is contingent.

1 Inst. 378 *a*.

20. Thomas Lane devised his messuage, &c. unto and to the use of his brother George Lane and his assigns, for and during the term of his natural life, without impeachment of waste; and from and after his death, then to the use of Catherine Benger, her heirs and assigns for ever, in case she the said Catherine Benger should survive and outlive his said brother, but not otherwise; and in case the said Catherine

Doe v. Scudamore, 2 Bos. & Pull. 289.

Benger should die in the lifetime of his said brother, then he devised the said messuage, &c. to the use of his brother, George Lane, his heirs and assigns for ever.

It was held, that this was a contingent remainder in Catherine Benger.

21. In the contingent remainders which fall under this head, the event which makes them contingent does not in any way depend on the manner in which the particular estate determines; as whether it determines in one manner or another, the remainder takes place equally. This distinguishes them from the first sort.

22. The third kind of contingent remainder is, where it is limited to take effect upon an event which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate; for it is a rule of law, which will be discussed in a subsequent chapter, that a remainder must vest, either during the continuance of the preceding estate, or at the very instant of its determination. So that if the event does not happen during the continuance of the preceding estate, the remainder becomes void.

3 Rep. 20 *a.* 23. Thus, Lord Coke says, if a lease be made to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder is contingent: for though J. D. must die some time or other, yet he may survive J. S., by whose death the particular estate will determine, and the remainder become void.

24. The fourth sort of contingent remainder is, where it is limited to a person not ascertained, or not in being, at the time when such limitation is made.

1 Inst. 378 *a.* 3 Rep. 10 *a.* 25. Thus, if a lease be made to one for life, remainder to the right heirs of J. S.; now, there can

no such person as the right heir of J. S. till his death, for *nemo est hæres viventis;* and J. S. may not die till after the determination of the particular estate; therefore such remainder is contingent.

26. So where an estate is limited to two persons during their joint lives, remainder to the survivor of them in fee, such remainder is contingent, because it is uncertain which of them will survive. Cro. Car. 102.

27. The usual remainder limited in all settlements before marriage, to the first and other sons of the intended husband, by his intended wife, is a contingent remainder.

28. The instances produced of the first kind of contingent remainders may appear to be cases of conditional limitations, not falling strictly within the definition of a remainder; but it will be proved in the next chapter that they are remainders in the most strict and technical sense of the word.

29. There are some cases which fall literally under one or other of the two last kinds, which are, nevertheless, ranked among vested estates. Exceptions.

30. With respect to those cases which are exceptions to the third kind of contingent remainders, it has been held that a limitation to A. for 80 or 90 years, if he shall so long live, with a remainder over after the death of A. to B. in fee, is not a contingent remainder; for the mere possibility that a life in being may endure for 80 or 90 years after such a limitation is made, does not amount to a degree of uncertainty sufficient to render a remainder contingent. Limitation to A. for 90 Years, if he shall so long live.

31. Lord Derby covenanted to stand seised to the use of himself for life, remainder to another person for 89 years, if Ferdinando, his son, should so long live, remainder after the death of Ferdinando to his Lord Derby's Case, Lit. Rep. 370.

second son in tail. Adjudged, that the remainder
Pollex. 67. vested presently, and that the possibility of Ferdinando's outliving the term of 89 years would not make it contingent.

Napper v. Sanders, Hut. 119.

82. A. made a feoffment in fee to the use of himself for life, remainder to the feoffees for 80 years, to B. and C. his wife, should so long live; if C. survived B., then to the use of C. for life; after her death to the use of the first son of C. and B. in tail; for default of such issue, to the use of D. and E. and the heirs of the.. bodies, remainder to the right heirs of A. A. died, and C. died, leaving a son, who died without issue; thereupon D. and E. entered, and made a lease to the plaintiff, upon whom the defendant, as son and heir of A., entered.

The question was, whether the remainder in tail to the first son of C. and B., and the remainder to D. and E., were executed, or were contingent, upon the estate for life to C. Adjudged, that they were vested, and not contingent; that the possibility of B. and C. outliving the term of 89 years did not make the remainders to them contingent: and Lord Derby's case was stated and admitted.

Pollex. 67.

83. This doctrine is further confirmed by Lord Hale, who has laid it down, that if a feoffment were made to the use of A. for 99 years, if he should so long live, and after his death to the use of B. in fee, this should not be contingent, but it should be presumed that his life would not exceed 99 years.

84. If the term of years is so short as to leave a common possibility that the life on which it is determinable may exceed it, the remainder will be deemed contingent; therefore if an estate is limited
3 Rep. 20 *a*. to A. for 21 years, if he shall so long live, and after his death to B. in fee, this is a contingent remainder,

because there is no improbability in supposing that the life may exceed the term.

35. Sir James Beverley devised lands to his eldest son Thomas, for the term of 60 years, if he should so long live; from and after his decease, to his grandson James, the eldest son of Thomas in tail male, remainder in tail to Thomas his next brother. James the grandson intermarried with the plaintiff, upon which a settlement was made, and a common recovery suffered by Thomas the father and James the son. Beverley v. Beverley, 2 Vern. 131.

It was objected, that the devise to Thomas being only of a term of 60 years, if he should so long live, then to James; that the freehold during the life of Thomas was in abeyance, and no good tenant could be made to the præcipe; by consequence, James the grandson being dead without issue male, the lands belonged to the defendant Thomas, under the entail.

Mr. Finch argued for the plaintiff, that the recovery was well suffered; that the limitation of the entail was good, expectant on the term for 60 years; and that it was so resolved in Lord Derby's case. That the devise to Thomas for 60 years, if he should so long live, and from and immediately after his decease, then over, ought to be intended of his dying within the term, which was highly presumable, Thomas being then above 40 years old, the possibility that Thomas might overlive the term was very remote; so that there was not any gap or *hiatus* in the settlement; but by this construction the freehold vested immediately in James, and Thomas had only a term for 60 years, if he should so long live.

The Court said, it would be hard to make such construction on the words of the will, as to say, where a term is limited to a man for 60 years, if he shall so long live, and from and after his decease to A. B.,

that it must be meant, from and after his decease within the term; for suppose he should outlive the term, should the remainder-man take in the lifetime of Thomas? That were a construction contrary to the words and intention of the testator.

36. In all cases where it is not admitted that there is such a degree of possibility of the life's exceeding the term, as is supposed sufficient to create a contingency in the remainder, there (says Mr. Fearne) the remainder cannot fall within the description of a freehold to commence *in futuro*; for when we suppose the remainder to be vested, we of consequence admit that it passes immediately, subject to and expectant on the preceding term; otherwise it cannot be vested; and then it is a freehold commencing *in præsenti*, and not *in futuro*. If the life cannot exceed the term, and the term must determine with the life, the limiting an estate to commence from the expiration of the life, is in effect limiting it to commence from the determination of the term. In which latter mode of limitation there could exist no doubt of the remainder's passing immediately, and being vested. Upon these principles alone, without recurring to any other, the case put, and distinction taken, by Lord Hale, may be admitted as law.

ante, § 33.

Rule in Shelley's Case.

37. There are three exceptions to the fourth sort of contingent remainders. The first arises from a rule of law, that wherever the ancestor takes an estate of freehold, and a remainder is thereon limited, in the same conveyance, to his heirs, or to the heirs of his body, such remainder is immediately executed in the ancestor so taking the freehold, and is not contingent. The origin of this rule, and the cases which have arisen upon it, will be stated under the Titles *Deed* and *Devise*.

38. The second exception arises from a rule of law, which has been stated in Title XI. ch. 4. § 34. That an ultimate limitation to the right heirs of the grantor will continue in him as his old reversion, and not as a remainder; though the freehold be expressly limited from him.

Limitation to the right Heirs of the Grantor.

39. The third exception arises from the respect which the law pays to the intent of a testator, where it can be plainly collected from his will, that he used the word heir as a *descriptio personæ*, or sufficient designation of the person, for the remainder to vest, notwithstanding the general rule that *nemo est hæres viventis*. The cases in which this point has occurred will be stated under Title XXXVIII. *Devise*.

Heir sometimes a *Descriptio Personæ*.

40. There is a very material difference between that kind of uncertainty which makes a remainder contingent, and an uncertainty of another kind, namely, the uncertainty of a remainder's ever taking effect in possession: for wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person in *esse*, and ascertained, in that case, notwithstanding the nature and duration of the estate limited in remainder may be such as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent, but a vested remainder. As if a lease be to A. for life, remainder to B. for life or in tail; here, notwithstanding B. may possibly die without issue in the lifetime of A., and consequently never come into possession; yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate.

What kind of Uncertainty renders a Remainder contingent.

41. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for

to that every remainder for life or in tail, expectant on an estate for life, is and must be liable; as has been observed in the preceding section. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.

Fearne, Cont. Rem. 329.

42. Thus, if there be a lease for life to A., remainder to B. for life; the remainder to B., although it may possibly never take effect in possession, because B. may die before A., yet from the very instant of its limitation, it is capable of taking effect in possession, if the possession were to fall by the death of A. It is therefore vested in interest; though perhaps the interest so vested may determine by B.'s death, before the possession he waits for may become vacant.

Idem.

43. On the other hand, if there be a lease for life to A., and after the death of J. D. remainder to B. in tail, in that case the remainder to B. is not capable of taking effect in possession during the life of J. D., although the possession should fail by the determination of A.'s estate. But if J. D. chance to die before the determination of the particular estate, then does B.'s remainder, by such event, become capable of taking effect in possession, when it shall happen to fall, and is then in the same state as if it had been originally limited without any regard to the death of J. D.

Idem.

44. This very essential alteration in the nature of B.'s remainder, occasioned by the timely event of J. D.'s death, is the change of a contingent into a vested estate. Before that event, it had not the capacity of vesting in possession; and it was doubtful

whether it ever would have it or not; it was therefore not vested at all: by that event it acquires the capacity of vesting in possession, when the possession becomes vacant; it is therefore vested in interest, though it is yet uncertain whether it will ever vest in possession; for it is still possible that B. may die without issue during the continuance of the particular estate.

45. It follows, that whenever the preceding estate is limited, so as to determine on an event which certainly must happen; and the remainder is so limited to a person in *esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, whenever the preceding estate, except in the cases before mentioned as exceptions to the descriptions of a contingent remainder, is limited, so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not in *esse*, or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent. Idem.

46. Where an estate is limited to A. for life, remainder to B. during the life of A., it is a vested remainder; for here is a preceding estate, to determine on an event which certainly must happen, the death of A. and the remainder is so limited to a person in *esse*, that the preceding estate may, by some means, viz. by forfeiture or surrender, determine before the expiration of the estate limited in remainder, that is, before the expiration of A.'s life; accord- Idem, 331.

ingly, if A.'s life estate be not expired at the determination of the particular estate, which it will not if A. should commit a forfeiture, or make a surrender, then will the remainder take effect in possession.

47. This doctrine was formerly doubted; but it has been resolved in the following case, that a remainder to trustees, during the life of a tenant for 99 years, if he should so long live, to take effect from and after the death of such tenant for life, or other sooner determination of the estate limited to him, was a vested remainder.

Berrington v. Parkhurst, 3 Atk. 135. Willes R. 327.

48. John Dormer, upon the marriage of his eldest son, conveyed several estates (after a great number of preceding limitations for life and in tail), to the use of Robert Dormer for 99 years, if he should so long live, and, from and after the death of the said Robert Dormer, or other sooner determination of the estate limited to him for 99 years, to the use of trustees and their heirs, during the life of the said Robert Dormer, upon trust to preserve the contingent remainders thereinafter limited; and after the end or other sooner determination of the said term, to the use of the first and other sons of the said Robert Dormer successively in tail male, with remainder over.

One of the questions in this case was, Whether the remainder limited to trustees to preserve contingent remainders, was a vested or a contingent remainder?

The Court of King's Bench determined, that it was a vested, and not a contingent remainder.

6 Bro. Parl. Ca. 352.

Upon a writ of error to the House of Lords, it was contended for the plaintiff in error, that the estate being limited to the trustees, *after the death of Robert Dormer*, during his life, was a void limitation, because it could never take effect in possession. That if the limitation to the trustees was not void, but the words

after the death of Robert Dormer might be rejected, and the limitation to the trustees to take effect in the disjunctive, viz. *or other sooner determination of the term;* yet that the trustees, by force of those words, took no vested remainder, but their estate remained in contingency; for no remainder could be said to be vested, unless it was so limited as to come into the possession of the remainder-man upon every determination which might happen of the particular estate; but the words *other sooner determination of the term,* could not extend to a determination of the term by effluxion of time; because the estate *after the end of the term* (which, in a legal sense, always signified *after the end by effluxion of time*) was, by express words, limited to the first son of Robert Dormer; so that the words, *other sooner determination,* could extend only to a determination of the term by surrender or forfeiture, which might or might not happen. It was admitted, that when a remainder was limited to take effect in possession, upon an event which of *necessity must happen,* such remainder would vest; but if it was limited to take effect in possession upon an event *which might never happen,* then it did not vest. Now, it was not an event which must necessarily happen, that Robert Dormer's term should end by surrender or forfeiture, because it might determine by effluxion of time or death; so that the present case was no more than this, viz. a limitation to Robert Dormer for 99 years, if he so long live, and if his estate shall determine by surrender or forfeiture, then to the trustees during his life; and which was plainly no more than a contingent remainder. That this construction of the limitation to the trustees was most agreeable to, and best answered the intention of the parties to the settlement; the end and design of

appointing trustees to preserve contingent remainders in this and all other marriage settlements, being only to give them a right to enter, upon any conveyance made by the particular tenant for life or years, to destroy the contingent remainders *before they arise.*

On the other side it was argued, that the estate limited to the trustees to preserve the contingent remainders, was a vested remainder, to take effect in possession during the life of Robert Dormer, upon the determination of the particular estate, limited to him for 99 years, either by effluxion of time, forfeiture, or surrender; and though that part of the limitation which depended upon the contingency of Robert Dormer's death, was of no operation or effect to vest an estate in possession in the trustees on that single event; yet, as the particular estate for 99 years might determine in his life-time by either of the other events happening, that is, forfeiture or surrender, the remainder vested in the trustees took effect in possession; and a remainder so limited is well warranted by the rules of law, and is neither void nor contingent. That to make this a contingent remainder from the words *or other sooner determination*, would be contrary to the established notion of what the law calls a contingent remainder; for such a remainder can only be one of these three ways:—either where the person to whom it is limited is not in *esse*, or where the particular estate may determine before the remainder can take effect, or where some collateral accident must happen before it can take effect. But none of these fell out in the present case; for the persons to whom the estate was limited, viz. the trustees, were existing. The remainder to them would take effect immediately upon the determination of the particular estate by surrender or forfeiture;

and here was no collateral accident to happen before it could take place, but only such as made a determination of the particular estate, and what was implied in its very creation. The words, *or other sooner determination*, are what are implied in every term for years, and to which every term is subject by surrender or forfeiture: they are no other than what are made use of in all common limitations of estates to trustees to preserve contingent remainders in every settlement. To put, therefore, such a construction upon these words, as to make the estate arising from them to the trustees a contingent remainder, would disappoint the very end proposed by them: it would frustrate the intention of the parties, and endanger most of the family settlements in the kingdom.

The Judges having been consulted on this case, Lord Chief Justice Willes delivered their unanimous opinion; of which I shall transcribe that part which relates to the present question.

"We deny that this estate so limited to the trustees was such a contingent remainder, that it did not vest immediately. The notion of a contingent remainder is a matter of a good deal of nicety; and, if I should trouble you with all that is said in the books concerning contingent remainders, and the instances that are put of such contingent remainders, I am afraid it would rather tend to puzzle than enlighten the case. I choose, therefore, to tell your Lordships what are the contingent remainders that do not vest, and what remainders vest immediately, though they are sometimes (though very improperly) called contingent remainders. The definition which was given by the counsel for the appellants of a contingent remainder which does not vest, is, where the particular estate may determine before the remainder can take place in possession; and that if it is uncertain when it will

Willes Rep. 337.

take place in possession, and it may happen that it never will take place in possession, the remainder will not vest. But this is not a just definition; for, if this were true, it would overturn all the settlements that ever were made. I will mention but one instance, though I might mention a thousand; as, where an estate is limited to A. for his life, remainder to another, and the heirs of his body. I believe no man in his senses ever doubted but this was a vested remainder; and yet it is within their definition; for, suppose the remainder-man in tail dies without issue, before the tenant for life, then this remainder will never take place in possession. As, therefore, this is not a proper definition, we beg leave to acquaint your Lordships what we think is; and we think there are but two sorts of contingent remainders which do not vest.—1st. Where the person to whom the remainder is limited is not in *esse* at the time of the limitation; 2dly. Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate. Many instances of such contingent remainders might be put, which will fall under one of these heads; and I will beg leave to put one of each, the better to illustrate this matter. If the first limitation be to one for life, or for years, and the next limitation to the son of B., who, at the time, has no children, this is a contingent remainder of the first sort. If there be a limitation to A. for life, remainder to B. after the death of J. S., or when a third person then at Rome returns from thence, this is a contingent remainder of the second sort. In the first case, if the tenant for life should die, or the term for years expire before B. has a son born, the remainder never vests at all. And, in the second case, if B. dies before J. S., or before the man returns from Rome, the remainder never vests; because the death

of J. S., or the return of the person from Rome, were both conditions precedent. And these are instances, amongst many others, of contingent remainders which do not vest, and of which you may find great variety in Boraston's case, 3 Coke Rep. 20. But the present limitation to the trustees plainly does not fall under either of these heads. The trustees were persons in being, and their estate was not to commence on any collateral matter, but upon all determinations of the estate of Robert Dormer which could happen during his life; and the estate was limited to them for no longer time. To enforce and illustrate this, I beg leave to mention two or three other things. Will any one say, That any thing can descend to the heir that did not vest in the ancestor; so that, if nothing vested in the trustees, the limitation to them and their heirs is nonsensical; for, according to this notion, if they should die before the contingencies happen, their heirs can take nothing; and yet this word *heirs* has been put in every such limitation for 200 years last past, for it is so long since the statute of uses; so that during that time, we have been all in the dark, and this new light is but just sprung up, which if it prevail, for another reason as well as this, will overturn all the settlements for 200 years last past. For in every one of them, the limitation is either in the same words as the present, or, after the end or other sooner determination of the particular estate, which are words tantamount to this, for end or determination certainly comprehends death, as well as effluxion of time. If, therefore, I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should rather choose to put a construction on these words contrary to the rules of law, than overturn many thousand settlements, according to this maxim, founded on the best reason, *communis error*

facit jus, and, *ut res magis valeat quam pereat.* But the present case, for the reasons I have already mentioned, is not, I think, liable to this objection: to prove which, I beg leave only to put one case:—A., tenant in fee, grants an estate to B. for 99 years, determinable in his life; supposing B. outlive the term, or surrender, or forfeit, no one, I believe, will say but that A. may enjoy the estate again. If so, a contingent freehold was in him during the life of B., for it could not be in B., because he had only a chattel interest; and it could not be in any one else;—and if it were in A. it must be a vested interest, for it was never out of him; and if A. had a contingent freehold during the life of B., no one can say but that he might grant it over; and if he do, it must be of the same nature it was when it was in A., and, consequently, a vested freehold. And this case I have put, is expressly held to be law in Co. Lit. 42 *a.* in Cholmeley's case, 2 Co. 51 *a.* and in the year book of Edward III. which is there cited."

The judgement was affirmed.

An intervening Remainder may be contingent, and a subsequent one vested.

Fearne, 338.

49. It frequently happens that contingent remainders intervene between the particular estate, and other limitations over; upon which cases we must observe, that whenever a contingent remainder is limited, which is followed by another limitation over, if the contingent limitation be not in fee, the subsequent limitation may be vested, if made to a person in *esse*.

Uvedall v. Uvedall, 2 Roll. Ab. 119.

Tit. 3. c. 2. § 43.

50. Thus, if an estate be limited to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail; if B. has a son born before A., such son will have a vested remainder in him. But if A. should afterwards have a son, he will take a vested estate precedent to that of B.'s son.

51. Lands were limited to husband and wife for their lives, and after their decease, to their first issue male, and to the heirs male of such issue, and so over to the second, third, and fourth issue male, &c. And for want of such issue, to the heirs male of the body of the said husband and wife. It was held that this last limitation should be executed *sub modo*; that is, in such manner as to open and separate itself from the first estate for life, whenever the contingency happened. Bowle's Case, 11 Rep. 97.

52. The preceding cases are instances where the contingency of the intervening remainders arose from their being limited to persons not in *esse*. But if there be a remainder limited to a person *in esse*, so as to depend on a contingent event, if the same contingency be not considered as extending to the subsequent limitations, such of those limitations as are to persons in *esse* may be vested.

53. Thus, in the case of Napper v. Saunders, one of the questions was, whether the remainders, subsequent to the remainder for the life of C., were contingent or vested: it was agreed that C.'s estate for life was contingent, on the event of her surviving her husband; but still it was held that the subsequent remainders were vested. ante. Tracy v. Lethulier, infra.

54. We have seen, that no remainder can be limited after a limitation in fee; but two or more several contingent estates in fee may be limited, as substitutes or alternatives, one for the other, and not to interfere; but so that one only can take effect, and every subsequent limitation be a disposition, substituted in the room of the former, if the former should fail of effect. Two contingent Estates in Fee may be limited in the Alternative. Fearne, 547.

55. Sir Michael Armyn devised certain lands to Evers Armyn for life, and, in case he should have Loddington v. Kyme, 1 Ld. Raym. 203.

S. C. Barnardiston v. Carter, 3 Bro. Parl. Ca. 64.

1 Ld. Raym. 208.

infra, ch. 6.

any issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then he devised the manor of Pickworth to Thomas Style in fee, and the manor of Willoughby to Sir Thomas Barnardiston in fee. It was determined, that the first remainder was a contingent fee to the issue male of Evers Armyn; and the remainder to Sir Thomas Barnardiston was a contingent fee also, not contrary to, but concurrent with the former, according to the notion in Plunkett v. Holmes, and was a contingency with a double aspect. For if Evers had had issue male, then the remainder had vested in such issue male in fee; if he died without issue male, that is, (said Treby) if he never had issue male, then to Sir Thomas Barnardiston in fee. And these were not remainders expectant, the one to take effect after the other, but were contemporary.

Doe v. Holme, 2 Black R. 177.

56. A person devised all his lands to his son J. L. for the term of his natural life, and, after his decease, unto the heirs male and female of the body of his said son J. L. for ever; and if his said son should die, leaving no lawful issue, then he devised the premises to his daughter Elizabeth, and her heirs and assigns for ever.

After the death of the testator, J. L. the son entered, and suffered a recovery.

The Court was of opinion, that the son acquired an estate in fee simple by the recovery. For if it was an estate tail in him, there could be no doubt; and if he had only an estate for life, with remainder in fee to his heirs male and female, (which the Court rather took it to be), then this, being a contingent remainder, was destroyed by the common recovery; and all subsequent remainders depending thereon

were also barred, according to the case of Loddington v. Kyme, which resembled this case in all points.

57. A will was made in these words: "I give my messuage, &c. to my son J. S. for life, and after his death, unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them." Goodright v. Dunham, Doug. 265.

It was determined, that both the devises were contingent remainders in fee.

58. A person devised lands to his niece Dorothy for life, remainder to trustees to preserve contingent remainders, remainder to all and every the children of Dorothy, begotten or to be begotten by his nephew J. C. and their heirs for ever, to be equally divided among them, but if only one child, then to such only child and his or her heirs for ever; and, for default of such issue, to James Comberback for life, remainder to trustees to preserve contingent remainders. Doe v. Perryn, 3 Term. R. 484.

Lord Kenyon said, there was nothing to distinguish this case from Loddington v. Kyme, and Goodright and Dunham. The clear intent of the devisor was, that the children of Dorothy, if any, should take a fee; and if she had no children, then that the remainders over should take effect; but Dorothy had children, by which the limitations over were defeated.

59. Mr. Serjeant Hill, in arguing the above cases, cited a determination of Lord Hardwicke upon a case nearly similar. Ives v. Legge, cited 3 Term Rep. 488. MS. Rep.

A person devised to his wife Elizabeth, and her heirs, all his freehold, leasehold, and personal estate, charged with 200l., to be laid out on a house, which he gave to his daughter Marthana, during the term of her natural life, and after her decease, then the same to go and be enjoyed by the children of her

body begotten, and their heirs; and, in default thereof, to his son William Legge, his heirs and assigns. William Legge died in the lifetime of Marthana, but devised his interest to the plaintiff; and then Marthana died without children. The question was, whether this devise to William was good, which depended upon what estate he took by his father's will; whether a vested remainder, or a remainder depending upon the contingency or possibility of Marthana's dying without children.

Lord Chancellor.—This is a vested remainder in William Legge: Marthana took no more than an estate for life; for, when an estate for life is expressly given, no greater estate shall arise by implication: subsequent words of contingency, enlarging the estate only, where no express estate for life is devised. Then, as to the children, the question is, whether this be a limitation to them in fee or in tail? Had there been no remainder limited over, they would have taken a contingent remainder in fee: but there being a limitation to their uncle, it is impossible they should die without heirs, during his or any of his children's life. The doubt arises from the equivocal words *in default thereof*; whether they relate to Marthana's dying without children, or to the children's dying without heirs. If to the first, the case will then amount to that of Loddington v. Kyme, and make this a fee with a double aspect, or, as it is called in that case, two concurrent contingencies, of which either is to start, according as it happens, being remainders contemporary, and not expectant one after another. But then both will be contingent, as well that to the children of Marthana, as that to William; which is a construction never made without an absolute necessity, as there was in Loddington

v. Kyme, where the words were, " to E. Armyn for life, and in case he have any issue male, then to such issue male and his heirs for ever, and if he die without issue male, then over." And which was a very singular case. But here is no such necessity; the words, *in default thereof*, taking in both the contingencies, as well that of Marthana's dying without children, as of her children dying without heirs; which brings it to no more than the common ordinary limitations in settlements, which take in all the contingencies that can happen. And, as the Court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so, neither does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment, which would have been the case here, by this forced construction of the defendant; since, by taking this for a contingent remainder in William, it would have been in Marthana's power to destroy the whole before the birth of a child.

60. Mr. Fearne observes, that in this last case the word *thereof*, upon which the construction turned, was equally applicable to the heirs of the children, as to the children themselves; and the heirs being the last antecedent, there was no ground for excluding the reference to them; which reduced the case to that of a devise to one and his heirs, and in default of heirs, then to a person who was a collateral heir of the first devisee. Cont. Rem. 556. Vide Doe v. Reason, 3 Wils. R. 244.

61. Where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested, But no Estate after a Remainder

in Fee can be vested.

except in one case, which will be mentioned hereafter.

ante, § 55. 1 Ld. Raym. 208.

62. Thus, in the case of Loddington v. Kyme, it was determined, that the remainders to Thomas Style and Sir Thomas Barnardiston were contingent, because the preceding limitation to the issue of Evers Armyn was a contingent fee; and the Court took the distinction, that where the mean estates are for life, or in tail, the last remainder may, if it be to a person *in esse*, vest; but that no remainder after a limitation in fee can be vested.

63. In all cases where the first contingent remainder is in fee, or where there are concurrent remainders, if the first remainder becomes vested, all the subsequent remainders become void: for then they become remainders expectant on the determination of an estate in fee-simple, or concurrent remainders.

Keene v. Dickson, 3 Term R. 495.

64. Thus, in a case cited by Mr. Justice Buller, where the devise was to G. Pinnock for life, remainder to her first and other sons in tail general, and for default of such issue male, remainder over: and it was contended at the bar, that the word male might be rejected; but the Court said they could not do it; but held that the remainder over was a contingent devise, only on the event of there never being a son, and if there were a son ever born, though he died, the remainder over was void. In that case, a son was born, who died during the life of G. Pinnock, on the birth of whom the estate vested in him, and the limitation over was void.

Unless the Remainder be a contingent determinable Fee.

65. It seems however, that a contingent determinable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to a person *in esse* from being vested.

66. Sir W. Dodwell devised all his estates to his daughter for life, remainder to trustees to preserve, &c., remainder to her first and other sons in tail. In case his said daughter should die without issue of her body living at her decease, then he devised his estates to trustees and their heirs, until his cousin, Sir H. Nelthorpe, should attain his age of 21 years; to whom he devised all his estates, after he attained his age of 21 years, for life, remainder to his first and other sons in tail male; in default of such issue, or in case the said Sir H. N. should happen to die before he attained his age of 21 years, and without issue, then to S. Lethulier for life, &c.

Tracey v. Lethulier, 3 Atk. 774. Amb. 204.

Lord Hardwicke held, that the contingency of the daughter's dying without issue, living at her death, affected only the estate limited to trustees, until Sir H. N. should attain 21: that this limitation to trustees was not an absolute fee, as was contended, but a determinable fee: that the estate limited to Sir H. N. was only contingent until he attained 21: that this contingency extended to none of the subsequent estates; and therefore the remainders over to persons *in esse* were vested.

67. It frequently happens that estates are subject to a power of appointment in the first taker, with remainders over in default of such appointment. And it is now settled, that such a power does not suspend the effect of the subsequent limitations, or keep them in contingency.

A Power of Appointment does not suspend Remainders.

Vide Tit. 32. c. 13.

68. As to the cases wherein a condition annexed to a preceding estate is, or is not, considered as a condition precedent, to give effect to the ulterior limitations, such cases may be distinguished into three classes:—1. Limitations after a preceding estate which is made to depend on a contingency that never takes

Effect of a Contingency annexed to a Preceding Estate.

Fearne, Rem. 355.

effect. 2. Limitations over upon a conditional contingent determination of a preceding estate, where such preceding estate never takes effect at all. 3. Limitations over upon the determination of a preceding estate by a contingency which, though such preceding estate takes effect, never happens.

The cases of Napper v. Sanders, and Tracy v. Lethulier, appear to fall under the first class in this distribution; in which it was held, that the contingency affected only that estate to which it was first annexed, without extending to the ulterior limitations.

Bradford v. Foley, Doug. 53.

69. In a case referred by the Court of Chancery to the Court of King's Bench, the facts were:—T. Hey devised all his real estates to trustees, to the use of his son Thomas for life, remainder to the first and other sons of Thomas by any future wife in tail male, remainder to the daughter and daughters of such future wife and their heirs, as tenants in common; provided, that if his son should marry any woman related to his then wife, all and every the above uses, so far as the same related to the issue of such future marriage, should cease and be void; and the said trustees should stand seised of all the premises to the use of the children of his brother John Hey and their heirs, as tenants in common.

Soon after the death of the testator, Thomas Hey, the son, died without issue, and without having married again, leaving Thomas Farrin Hey his heir at law.

The question for the opinion of the Court was, whether the children of John Hey, the brother of the testator, had taken any and what estate in the case that had happened?

The Court certified their opinion that the children of John Hey, the testator's brother, took estates tail

under this devise. The Court must, therefore, have thought that the contingency of the sons marrying again, &c. was confined to the estates limited to his future issue.

70. In another case referred by the Court of Chancery to the Court of King's Bench, the facts were:— Edward Bushby, reciting that he was desirous to provide for his sisters, but considering that his sister M. S. was already well provided for, during the life of her husband, devised all his estates in the city of Oxford, &c. to trustees, in trust that they should, during the life of M. S., pay the rents and profits to the testator's sisters, E. B. and M. B., their heirs and assigns, and from and after the decease of the husband of M. S., in case M. S. should be then living, in trust, as to one third part, to the use of the said M. S. for her life; and as to another third part, to his sister E. B. for life; and as to the remaining third part, to his sister M. B. for life; with several remainders to their first and other sons in tail male, remainder to their daughters as tenants in common, with cross remainders between their sisters; remainder over to J. S. Horton in tail, with several remainders over. Horton v. Whitaker, 1 Term R. 346.

The testator's sister, M. S., died in the lifetime of her husband, and the principal question was, whether the condition of M. S.'s surviving her husband was merely confined to the life estate, or was to extend to all the subsequent limitations.

The Court certified their opinion that the remainder to J. S. Horton was good. They, therefore, must have held, that the condition of the married sister's surviving her husband did not extend to any of the limitations subsequent to her estate for life.

71. The construction in these cases, as to the restriction of the contingency to the estate first hinged Fearne, Rem. 358.

upon it, appears to depend on the testator's apparent intention not to extend it farther; for wherever there is no apparent distinction in view, in this respect, between such estate and those that follow it, the contingency, it seems, will equally affect the whole ulterior train of limitations.

Davis v. Norton, 2 P. Wms. 390.

72. Thomas Hooker devised lands to his son William, and the heirs of his body; and if his said son should die without issue of his body, and the testator's wife, Alice, should survive his son, then that she should enjoy the premises for her life: after her decease they should be enjoyed by the testator's sister, Mary Stratton, for her life: after her decease, (the testator's son William being dead without issue, as aforesaid,) then the testator devised the premises to the lessor of the plaintiff. The testator's wife did not survive his son, but died before him.

Upon a question whether the ulterior devise over had not failed, by the wife's death in the son's lifetime, a case was made by consent, for the determination of the Judge (Reynolds) who tried it, whose opinion was, that the remainder limited by the will was contingent, depending on the death of the son without issue in the lifetime of the testator's wife; and as that contingency never happened, the remainder which depended thereon could never arise. The judge appears to have laid much stress on the words—"The testator's son being then dead without issue as aforesaid," annexed to the remainder after the wife's decease, as equivalent to a repetition of the contingency first expressed of the son's dying without issue, the wife then living.

Doe v. Shippard, Doug. 75.

73. Lands were devised to trustees, upon trust, out of the rents, to pay 20*l.* annually to the testator's daughter for life; to pay the residue of the rents, and

the whole, after her decease, to her husband for his life. If she should happen to survive her husband, then to stand seised of all the lands, upon the trusts after mentioned, viz. to his said daughter for life, then to her son H. and the heirs of his body, remainder to the heirs of the body of her husband by her, remainder to the heirs of her body by any other husband, remainder to her husband and his heirs for ever.

The testator's daughter died in the lifetime of her husband. It was held, that the limitations over should not take effect; for that the contingency was not confined to her life estate, but extended to all the subsequent limitations; the Court not finding upon the whole will sufficient to gather a different intent, so as to warrant them in supplying the omitted words.

74. Mr. Fearne observes, that in this case the contingency itself was expressly, by the words of the will, extended to, and equally connected with, all the subsequent limitations; for the trustees were, in that event, to stand seised of the lands to the several uses, intents, and purposes in the will after mentioned; which uses included as well the limitations to the wife for life, as those following it; so that there was no particular connexion of the condition with her estate, more than with any of the rest.

75. With respect to limitations over upon a conditional determination of a preceding estate, where such preceding estate never takes effect at all.—The first case was upon a devise to trustees for 11 years, remainder to the first and other sons of A. successively in tail male, provided they should take the testator's sirname. In case they or their heirs should refuse to take the testator's sirname, or die without issue, then he devised his land to the first son of B. in tail male, provided he took his sirname; if he

Scatterwood v. Edge, 1 Salk. 229.

refused, or died without issue, then to the right heirs of the devisor.

A. died without having had any son, B. had a son at the time of the devise. The Court did not agree as to the validity of the devise to the first son, after a term of years, without any preceding freehold to support it; but resolved that the subsequent limitation to the first son of B. who was then *in esse* and capable, took effect; that the preceding limitation to the first son of A. or the condition thereto annexed, did not operate as a precedent condition, which *must* happen, to give effect to the subsequent limitation to the son of B. but was only a precedent estate, attended with such a limitation.

76. Lord Hardwicke was of the same opinion, and
2 Ves. 422. has said,—"I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation; but if the preecedent limitation, by what means soever, is out of the case, the subsequent limitation takes place."

77. As most of the cases which occur on this point are cases where the whole fee was first limited; the further consideration of them will be postponed to
Tit. 38. c. 17. Executory Devises; only observing in this place, that if such a conditional limitation is not defeated by the falling of the preceding estate, in those cases wherein the whole estate is first limited, *d fortiori* it should not be defeated in the cases where the whole fee is not at first limited; but the remainder, though conditional, includes the residue of the estate, not before otherwise disposed of.

78. As to cases of the third class, it may be observed, that although where a remainder is limited to

take effect on a condition annexed to a preceding estate, and that preceding estate fails, it appears that the remainder shall nevertheless take place; yet where such preceding particular estate takes place, and the condition is not performed, the remainder, it has been held, will not take effect at the expiration of such preceding estate, unless in those cases where the apparent general intention of the testator calls for it. Fearne, 362.

79. It sometimes happens that a remainder is limited in words which seem to import a contingency, although in fact they mean no more than would have been implied without them; or do not amount to a condition precedent, but only denote the time when the remainder is to vest in possession. Adverbs of Time only denote the Period when a Remainder is to vest in Interest.

80. T. Boraston devised lands to A. and B. for eight years, remainder to his executors until such time as Hugh Boraston should accomplish his full age of 21 years; and when the said Hugh should come to his age of 21 years, then the testator declared his will to be, that he should enjoy the same to him and his heirs for ever. Hugh Boraston died under 21. It was contended that the remainder did not vest in him because he did not live to attain the age of 21; for as he was not to have it until 21, it was contingent on that event; it being uncertain whether he ever would attain that age. But it was resolved that the case was no other in effect than a devise of lands by a person to executors, until his son attained the age of 21 years, remainder to his son in fee; and that the adverbs of time, *when* and *then*, did not make any thing necessary to precede the settling of the remainder; any more than in the common case of a lease for life or years, and after the decease of the lessee, or the end of the term, remainder to another; in Boraston's Case, 3 Rep. 19.

which case the remainder vests presently. For when these adverbs refer to a thing which must of necessity happen, they make no contingency; for it is certain that every man must die, and every term will end; so that these adverbs *when* and *then* are demonstrations of the time when the remainder shall take effect in possession, not when the remainder shall vest.

1 P. Wms. 270. Fearne, 368.

Holcroft's Case, Moo. 486.

81. A. having two sons, B. and C., levied a fine to the use of himself for life, remainder to B. his eldest son for life, after to the first son of the body of B. and his heirs male, and so to four sons successively in tail; and if it fortune the said fourth son to die without issue male, then to remain to C. A. died, B. died without issue male, leaving a daughter. Adjudged, that the use vested in C. though B. had no issue male, and that B.'s having issue male was no condition precedent.

Webb v. Herring, Cro. Ja. 416.

82. Devise to A. for life, then to B. in tail, "and if my three daughters or either of them overlive A. and B., then they to have it; and after them I give it to J.W. &c." B. died, and two of the daughters died, living A. Then A. died. The question was, if this was a contingent estate; and if so, whether the contingency were performed by two of the daughters dying in the lifetime of B. Resolved, that it was not a contingent limitation, but only an expression when the remainder should commence, that is, take effect in possession.

Fortescue v. Abbot, Pollex. 479. T. Jones, 79.

83. Walter Thomas having four children, devised in these words: "The house wherein John Taylor dwelleth I give to my son John. Item, I bequeath to my daughter Grace that part and interest that I have in the house at Palace Gate. Item, I give to my daughter Elizabeth that garden, &c. Item, I give to my son William all the houses which I have in St. Mar-

tin's Lane. Item, my will is, that when either of my forementioned children shall depart out of this life, that then the houses, lands, goods, and whatsoever I have now given them, shall be equally divided betwixt them that are living."

The eldest son died. It was contended, that this limitation over to the children then living, was a contingent remainder to the survivors, depending on the particular estates for life to the children; that the eldest son's estate for life in the house devised to him was merged in the fee which descended to him on his father's decease; and consequently the contingent remainder to the survivors in this house was thereby destroyed. On the other hand it was insisted, and so adjudged by the Court, that this was not a contingent, but a vested remainder; that every child took a particular estate in his or her house, for life, with a vested remainder to the others, for their lives.

Anon. 2 Vent. 365.

84. A man devised certain lands to his wife, till his son and heir should attain his age of 21 years. When his son should attain that age, then to his son and his heirs. The son died at the age of 13 years. It was held by Lord Harcourt, that the remainder vested presently in the son upon the testator's death; and was not to expect till the contingency of his attaining 21; for in that case it never would have vested.

Mansfield v. Dugard, 1 Ab. Eq. 195.

85. A person devised all his estates to trustees, in trust to lay out the rents and profits in the maintenance and education of the two sons of his sister, during their minorities; and when and as they should respectively attain their ages of 21 years, then to the use and behoof of the said sons of his sister, and their heirs.

Goodtitle v. Whitby, 1 Burr. 228.

Lord Mansfield said the question was, whether the estate vested immediately in the two nephews, upon the death of the testator; or remained in contingency till their respective coming of age. He said he would lay down a rule or two, previous to his giving his particular opinion on the case. 1. Whenever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property. 2. Where an absolute property is given, and a particular interest is given in the mean time; as, until the devisee shall come of age, &c. then to him, &c.; the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainder-man is to take in possession. To this purpose was Boraston's case, where this doctrine was fully laid down and explained. Upon the whole he held that the nephews took an immediate gift, with a trust to be executed for their benefit, during their minority.

8 Rep. 95 *b*.

ante, § 80.

Doe v. Lea, 3 Term R. 41.

86. M. Lea devised copyhold estates to T. Lea and E. Johnson, their heirs and assigns, to hold to them and their heirs until M. Lea, second son of his nephew Thomas, then an infant, should attain the age of 24 years; on condition that he should, out of the rents and profits, keep the buildings in repair. Item, he devised to M. Lea his great nephew, and to his heirs and assigns for ever, *when and so soon as* he should attain his age of 24 years, the premises in question; and directed the trustees to surrender the premises accordingly. M. Lea attained the age of 21, but died under 24, intestate and without issue. It was contended that the words, *when and so soon*, operated as a condition precedent to M. Lea's taking any interest under the devise; and the event of his

attaining the age of 24, not having happened, the condition was defeated; consequently his heir at law could take nothing; these words having the same meaning as *if M. Lea shall attain the age of* 24: and it was expressly determined to raise a condition precedent in the case of Brownswords v. Edwards. Tit. 38. c. 20.

Lord Kenyon observed, that the words in Brownswords v. Edwards were very different from the present; there it was, *if he should attain the age of* 21. But the words in this case only denoted the time when the beneficial interest was to accrue. He cited Boraston's case, and Goodtitle and Whitby; and concluded that the words in this case could not operate as a condition precedent, but as giving an absolute interest in fee, and denoting the time when the remainder was to take effect in possession; and therefore that the estate descended to the heir at law of M. Lea.

A Contingency sometimes considered as a Condition subsequent.

87. There are some cases where the contingency upon which an estate is limited, has been considered as a condition subsequent, instead of precedent, so that the estate becomes vested immediately, subject to be defeated by the condition when it happens.

Edwards v. Hammond, from the Record, 1 Bos. & Pul. N. R. 313.

John Hammond surrendered the premises in question to the use of himself for life; after his decease to the use of John Hammond the younger, and his heirs and assigns for ever, if it should happen that the aforesaid John Hammond the younger should live until he attained the age of 21 years; provided always, and under the condition nevertheless, that if it should happen that the aforesaid J. H. the younger should die before he attain the age of 21 years, then to remain to the use of the surrenderor and his heirs.

Resolved, that this was a condition subsequent, and that the estate vested immediately in J. H., subject to be devested if he died under the age of 21 years.

Bromfield v. Crowther, Idem.

88. A testator devised all his real estate to E. D. and J. R. for their lives successively; and after the decease of the longer liver of them, to J. D. Bromfield, if he lived to attain the age of 21 years; but in case he died before he attained that age, and his brother Charles Bromfield should survive him, in that case he gave his real estate to Charles Bromfield his brother, if he lived to attain the age of 21 years, but not otherwise; but in case both the abovementioned boys died before either of them attained the age of 21 years, then over. E. D. and J. R. died while J. D. Bromfield was under the age of 21 years.

The cause coming on at the Rolls, his Honour ordered a case to be made for the opinion of the Judges of the Common Pleas, upon the question whether Mr. Bromfield, in the events which had happened, took any and what estate or interest in the freehold or copyhold estates of the testator.

Vide Tit. 38. c. 16.

The Judges certified that Mr. Bromfield took a vested estate in fee simple in the freehold and copyhold lands, determinable on the event of his dying under twenty-one.

The Master of the Rolls decreed in conformity to this certificate. On an appeal to Lord Erskine, the decree was affirmed by him: and afterwards by the House of Lords.

Printed Cases 1811.

TITLE XVI.

REMAINDER.

CHAPTER II.

Of the Nature of the Event upon which a Contingent Remainder may be limited.

2. *It must be a legal Act.*
4. *And Potentia Propinqua.*
9. *Not repugnant to any Rule of Law.*
10. *Nor contrariant in itself.*
16. *It must not operate to abridge the particular Estate.*
29. *Of Conditional Limitations.*
35. *Estates may be enlarged on Condition.*

SECTION 1.

THE uncertainty of the event on which a remainder is limited, is in some cases the circumstance which makes it contingent. But a limitation, intended as a contingent remainder, may fail of taking effect on account of the following circumstances respecting the contingency upon which it is limited to take effect.

It must be a legal Act. 2 Rep. 51 *b.*

2. First, the contingent event being an illegal act; for Lord Coke says,—"The law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law, for it is *potentia remotissima et vana*, which by intendment of law, *nunquam venit in actum.*"

Blodwell v. Edwards, Cro. Eliz. 509.

3. Hence it has been determined, that a limitation to a bastard is void. Thus, where a man made a feoffment to the use of himself for life, remainder to the use of such issue of the body of Margaret Lloyd as should by common supposition be adjudged to be

begotten by the feoffor, whether legitimate or illegitimate. Resolved, that the remainder was void because the law doth not favour such a generation.

And Potentia Propinqua.

4. Secondly, the possibility upon which a remainder is to depend, must be a common possibility, or, *potentia propinqua;*

1 Inst. 25 *b.* 184 *a.*

as death, or death without issue, or coverture; for *potentia est duplex, remota et propinqua.* Hence

2 Rep. 51 *a.*

it has been determined, that a remainder to a corporation, which is not in being at the time of the limitation, is void, although such be erected afterwards during the particular estate; for at the time of the limitation it was *potentia remota.*

1 Inst. 264 *a.*

5. It is different if during the vacation of the mayoralty of D. a lease for life be made, remainder to the mayor and commonalty of D. The remainder is good, if there be a mayor of D. elected during the estate for life.

2 Rep. 51 *b.*

6. It is laid down in Cholmeley's case, that if a lease be made for life, remainder to the right heirs of J. S., this is good; for by common possibility J. S. may die during the life of the tenant for life. But if at the time of the limitation of the remainder there be no such person as J. S., but during the life of the tenant for life J. S. be born and die, his heir shall at no time take,

Fearne, 378.

because the possibility on which the remainder is to take effect is too remote; for it amounts to the concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it; viz. first, that such a person as J. S. should be born, which is very uncertain; and secondly, that he should also die during the particular estate, which is another uncertainty grafted upon the former. This

1 Inst. 25 *b.* 184 *a.*

is called a possibility upon a possibility, which, Lord Coke says, is never admitted by intendment of law.

7. Upon the same ground, says Mr. Fearne, arises the distinction between a remainder limited by a general description, and one limited by a particular name, to a person not *in esse*. In the first case the remainder is good, as a limitation to the right heirs of J. D. who is alive; or *primogenito filio* of B. who has no son then born: but in the other case the remainder is void; as if it be limited to G. son of D.; in that case, if D. hath not a son named G. at the time of the limitation, the law will not expect he should afterwards have a son so named; because it amounts to a possibility upon a possibility; viz. first, that he should have a son; and secondly, that such son should be named G. Rem. 378.

8. A case is cited from the year book 10 Edw. III. in Cholmeley's case, where, upon a fine levied to R., he granted and rendered the tenements to one J. and Florence his wife, for their lives, remainder to G. son of J. in tail, remainder to the right heirs of J.; and in truth, at the time of the fine levied J., had not any son named G., but afterwards he had a son named G. and died. 2 Rep. 51 *b*.

In a præcipe against Florence, it was adjudged that G. should not take the remainder in tail, because he was not born at the time of the fine levied, but long after; wherefore another, who was right heir to J., by judgement of the Court, was received.

This determination was founded on the principle that the law would not expect that J. and F. should have a son so named, because it amounted to a possibility upon a possibility; first, that he should have a son; and secondly, that such son should be named G.

9. It has been held, that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part Not repugnant to any Rule of Law.

only, and leave it good for the residue. Upon this principle it has been adjudged, that a proviso to make the estate of tenant in tail cease during his life, was void; for although the whole estate may be determined by a condition, yet part of it only, viz. during the life of the tenant in tail, shall not; in which instance the proviso is ineffectual, on account of its repugnancy to a rule of law.

6 Rep. 40 *b.*

4 Burr. R. 1941.

Nor contrariant in itself.

10. A condition may also be contrariant in itself; as in the case of a proviso for determining an estate tail, as if tenant in tail were dead. This had been held a contrariant proviso, and void on that account; because the death of tenant in tail does not determine the estate tail, but his death without issue; consequently, to say that the estate shall determine as if he were dead, amounts to saying that it shall determine as it would do upon an event, viz. the death of the tenant in tail, which event might not determine it; therefore such a proviso is contradictory, and absurd in itself.

Jermyn v. Arscot, 1 Rep. 85 *a.*

11. Thomas Cary devised to Peter Cary and the heirs male of his body, remainder in the same manner to his other sons; with a proviso, that if the said Peter Cary, or any of his other sons, or any of the heirs male of their bodies, should attempt or endeavour to sell, bargain, discontinue, &c., the estate of such person so attempting, should cease and determine, as if such person were naturally dead.

It was held, that this proviso was void, being against law, repugnant, and contradictory. Against law, because the whole estate ought to be defeated; repugnant, because an estate tail cannot be made to cease as if the tenant in tail was dead; for the death of a tenant in tail does not determine an estate tail, but his death without issue.

12. Sir R. Cholmley, by a conveyance to uses, limited his estate to the use of F. Cholmley for life, remainder to the use of H. Cholmley and the heirs male of his body, remainder over; with a proviso, that if the said Henry, or any of the heirs male of his body, should attempt or make any feoffment, his estate should cease as if he were dead. The proviso was held to be illegal and void. Cholmley v. Humble, 1 Rep. 86 *a.*

13. S. Corbet covenanted to stand seised to the use of himself for life, remainder to his eldest son Rowland and the heirs of his body; with a proviso, that if the said Rowland, or any of the heirs male of his body, should be resolved and determined, or advisedly should attempt or procure any act or thing concerning any alienation of the said premises, by which any estate tail thereof should be barred, that the estate to him limited should cease, only in respect to such person so attempting to alien, in the same manner as if such person was naturally dead. Corbet's Case, 1 Rep. 83 *b.*

After the death of C. Corbet, his son Rowland entered, and suffered a common recovery; and the person in remainder having entered, on the breach of the proviso, it was determined that the proviso was repugnant, impossible, and against law; for the death of a tenant in tail is not a determination of the estate tail, but his death without issue.

14. So, where a proviso similar to that in the last case was inserted in a deed, "it was resolved that it was impossible and repugnant that an estate tail should cease as if the tenant in tail was dead, (had he issue or not,) for an estate tail cannot cease so long as successive heirs continue. But here his intent was to continue the estate tail, and to cease it in respect of the party offending only, and not as to any other, which was impossible, repugnant, and against law; Mildmay's Case, 6 Rep. 40.

for every limitation or condition ought to defeat the whole estate, and not to defeat part of the estate, and leave part not defeated; and it could not make an estate to cease *quoad unam personam*, and not *quoad alteram*.

Tit. 13. c. 1. § 13.

Foy v. Hinde, Cro. Ja. 697.

15. So where a person devised his estate to H. K. and the heirs male of his body, until such time as the said H. K. or any issue male of his body should effectually and expressly assent, conclude, do, or go about to do, or make any act or acts to alter, discontinue, or change his estate tail.

H. K. joined with his son in levying a fine of the estate. The Court resolved—"That this was a perpetuity in our law books, and repugnant to the law, and not allowable; for he may not determine an estate tail by such a limitation, nor can he give title to another to enter, who is a stranger; for by the fine there was a discontinuance of the remainder, and a divesting thereof, so as he could not enter; for it was no limitation to enter, but after the effectual going about, and it was not effectual until the act was done; and when the act was done, the remainder was discontinued, and then he could not enter. Also they held these were uncertain, ambiguous, and inadequate words, to make the limitation of an inheritance by the determination thereof, and therefore void and repugnant to law, and the law would never give allowance to it; wherefore they held that the case was all one with the reasons in the cases of Sir A. Mildmay, Corbet, &c."

Vide Fearne, 383.

It must not operate to abridge the particular Estate.

16. The event or contingency on which a remainder is limited, must not operate so as to abridge, defeat, or determine the particular estate. This rule flows of necessity from the nature of a remainder, as exhibited in the definition of it by Lord Coke: so that

it is of the essence of a remainder that it should wait for, and only take effect in possession, on the natural expiration or determination of the first estate.

17. This rule also follows as a consequence of the rule already stated, that no one shall take advantage of a condition but the party from whom the condition moves, that is, the grantor and his heirs: for if he or his heirs take advantage of a condition, by entry or claim, the livery made upon the creation of the estate is defeated, and of course every estate then created is thereby annulled and gone. But the remainder ought to vest at the instant of the expiration of the preceding estate, and remainders are defeated by the entry of the grantor; therefore such remainder is void. It follows that a remainder properly so called cannot be limited to take effect upon a condition, which is to defeat the particular estate; whether such condition be repugnant to the nature of the estate to which it is annexed, or not. Tit. 13. c. 2. § 49.

18. If therefore a lease for life be made, upon condition that if a stranger pay to the lessor 20*l.*, then *immediately* the land shall remain to the same stranger; this remainder is void, for the tenant for life ought to have it during his life, and if so, during that time the stranger cannot have it, for he can take no advantage of the condition, but only the grantor or his heirs. Had it been limited that if a stranger pay to the lessor 20*l.*, then *after the death of the tenant for life*, it should remain to that stranger, it would have been a good remainder. Plowd. 29. 2 Leon. 16.

19. The distinction between the two cases is this. In the latter the remainder is not to vest in possession till after the determination of the estate for life, when it may vest of course. In the former it is limited to take effect in possession on the performance of a con-

dition, which is to defeat the estate for life; and not to wait till the particular estate be determined, by means consistent with the nature of its original determination.

Plowd. 24.

20. If a lease be made to two, the remainder over in fee, after the death of the first of them, this remainder is void; because, as the survivor must have the lands for life, by the nature of the first estate, the limitation over after the death of the first of them cannot take place without defeating the first estate, as to the interest of the survivor.

Sayer v. Hardy, Cro. Eliz. 414.

21. Upon the same principle it seems, that if an estate be granted to A., a widow, for life, remainder to B. in fee, on condition that A. continues a widow; if A. marries, the entry of the heir will defeat the estate to A. and also the remainder to B. But that if an estate had been granted to A. *durante viduitate*, remainder to B. upon A's marriage, her estate would determine by the nature of its limitation, and the remainder to B. would take effect.

Fearne, 363.

ante, c. 1. § 71.

22. Here however we are to observe, that if land be leased to one for life, &c. and if such a thing happen, then to remain to B., &c. This shall not be understood as intended to vest in possession immediately upon the happening of the condition, and in abridgement of the preceding estate; because, under that construction, the remainder would be void, for the reasons already given: but it shall be construed to vest in *interest*, upon the happening of the condition, and to remain as a remainder ought to do, that is, so as to await the determination of the preceding estate, before it comes into possession.

Colthirst v. Bejushin, Plowd. 23.

23. Thus, where lands were limited to husband and wife for their lives, remainder to A. their son for life;

if he should die in the lifetime of the husband and wife, that then the lands should remain to B. another of their sons, for life. It was resolved, that the remainder limited to B. was good; and that the words, "if A. should die in the lifetime of the husband and wife, then the lands should remain to B." did not operate to defeat the estate limited to the husband and wife, but only indicated the time when the remainder should become vested in interest.

24. The same law holds with regard to a subsequent remainder, limited to take effect on a condition which is to defeat a preceding remainder.

25. A. being seised in fee, leased to B. for life, remainder to C. for life; provided that if A. should have a son, who should live to the age of five years, the estate limited to C. should cease, and the land remain to that son in tail. It was determined, that the estate limited to the son was void, because it depended on a condition which operated to defeat the preceding remainder. Cogan v. Cogan, Cro. Eliz. 360.

26. It may happen, that notwithstanding a contingent limitation is *expressed* to commence from a period eventually anterior to the determination of the particular estate, yet the nature of the case may be such as not to admit of its taking effect in possession, in restraint, abridgement, or exclusion of the particular estate. As if such limitation over were to the grantee or devisee of the particular estate; which, instead of operating in any degree to defeat, exclude, or curtail the particular estate, would in effect remove its limits, and expand it into a greater estate. This is but in conformity to what was allowable at common law in regard to the enlargement of estates on condition; which limitations so far resemble contingent remainders as to require the Fearne, Rem. 396.

continuance of the particular estate till they are vested. And although the limitation should not so far approach the particular estate in *quality*, as to come within the doctrine of estates to be enlarged on condition, yet if it be such as cannot defeat, exclude, or abridge the particular estate, nor have any other operation than if the words *expressive of its time of commencement* had been omitted; or if it had been in express words postponed, *till after* the determination of the preceding estates, the objection to its effect as a *remainder* does not hold; as it then in effect gives no more than the *remnant* or *residue* expectant on the particular estate; and could not have entitled the grantor or his heir to enter at common law, in defeazance of the particular estate; nor operates at all to the prejudice of strangers; which are the reasons assigned against the validity of conditional limitations at common law.

27. Thus, suppose in the case of a lease to two, as in a former case, the limitation over after the death of the first of them had been to the survivor, instead of a stranger; this would not have avoided, defeated, or abridged the estate of the survivor, but actually have embraced it in the afflux of a greater, into which it would have run, under the technical term of merging, instead of being rescinded or nullified. The grantor or his heir could have no title to enter and defeat the particular estate, because there was no condition or proviso to make it cease, or carry the estate either expressly or implicatively to any body, from the devisee of the particular estate. Nor could the limitation operate to the prejudice of another; viz. the person otherwise entitled to the particular estate; because it was to that very person himself, and the effect would have been precisely the same if

ante, § 20.

the limitation had been, and from and after the determination of the estate aforesaid, to the survivor in fee. Nothing would therefore in that case have prevented the limitation over from operating strictly as a remainder at common law.

28. A person devised to his wife Elizabeth and his daughter Ann, a certain messuage, &c. to hold unto his said wife and daughter, for and during the term of their natural lives, and the life of the longer liver of them, in equal proportions; and then proceeded in these words:—"But in case my said daughter Ann should happen to marry and have issue of her body lawfully begotten, then and in that case, after the decease of my said wife, I give and devise all the said messuage, &c. unto my said daughter Ann, and to her heirs and assigns for ever. But if my said daughter Ann should happen to die single and unmarried, and without issue of her body lawfully begotten, then and in such case, I give and devise the said premises unto my said wife Elizabeth, and to her heirs and assigns for ever."

Goodtitle v. Billington, Doug. 753.

The testator died in 1774, leaving Elizabeth his widow, and Ann his daughter, who was his heir at law. Elizabeth died in 1775; after her death Ann suffered a recovery of the estate, and devised it to the defendant, and died unmarried. The heir of Elizabeth brought an ejectment against the devisee of Ann.

Lord Mansfield.—"It is perfectly clear and settled, that where an estate can take effect as a remainder, it shall never be construed to be an executory devise or springing use. Here the first limitation is to two persons and the survivor, so that a preceding freehold will be in the survivor; and the estate over is limited on a contingency upon which a remainder may depend; it is to the daughter and her heirs (not

issue) if she should marry and have issue; and it must have taken effect after the death of the survivor. There is another contingency on the event of the daughter's dying unmarried and without issue, (not on failure of her issue) and upon that event the remainder is to the widow in fee."

It was resolved, that the estate devised to Ann, in case she should marry and have issue, was a contingent remainder.

Of conditional Limitations.

29. It has been stated in Title XIII. that a condition must avoid or determine the whole estate to which it is annexed; and that the benefit of a condition can only be reserved to the donor and his heirs, not to a stranger. In consequence of this doctrine no remainder could be limited on a condition. 1st. Because such condition would operate so as to abridge the particular estate. 2d. Because the entry of the donor, for the condition broken, would defeat the remainder.

1 Roll. Ab. 472. 474. Fearne, 405.

Id. 407. 409.

30. It has, however, been long settled, that where, in a devise, a condition is annexed to a preceding estate, and upon the breach or non-performance thereof, the estate is devised over to another, the condition shall operate as a limitation, circumscribing the measure and continuance of the first estate; that upon the breach or performance of it, as the case may be, the first estate shall *ipso facto* determine and expire, without entry or claim; that the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have an immediate right to the estate. Thus is the testator's intention effectuated, by substantiating the subsequent estate, though limited to a stranger, and enforcing the performance of the condition by the determination of the preced-

ing estate upon the breach of it, notwithstanding that preceding estate be limited to the heir himself; and limitations of this kind are properly called conditional limitations.

31. Thus, where a person devised lands to his mother for life, after her death to his brother in fee; provided that if his wife (being then with child) be delivered of a son, that then the land should remain to him in fee. After the testator's death a son was born; held, that the fee of the brother should cease, and the estate vest in the son, upon the happening of the contingency. Dyer, 33. *a.* 127 *a.* Cro. Ja. 592.

32. In the case of Fry v. Porter, which has been already stated, it was held that Lady Ann Knowles had an estate tail till she married without consent. That the estate tail devised to her was subject to two limitations; the one in law, viz. dying without issue; the other express and in fact, viz. marrying without consent; which was properly a conditional limitation, not a condition; for, if it were a condition, it would descend to the heir at law, who might enter for a breach of it, and defeat the limitation over. It was therefore agreed, that the marriage without consent determined her estate tail, and the devise over took place. Tit. 13. c. 1. § 53. Bertie v. Faulkland, Tit. 13. c. 1. § 54.

33. A person devised lands to A., who was his heir at law, and other lands to B. in fee; and that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go to B. Anon. 2. Mod. 7.

After the testator's death A., entered on the lands devised to B., claiming them. It was held that this was a sufficient breach to give title to B., and that the condition imposed on the heir should not be taken as a condition, because if so, by descending on him who alone could enter for the breach of it, it

would in this case be fruitless and defeated: but it was held to be a limitation, which determined the heir's estate, and cast the possession on B. without entry.

Gulliver v. Ashby, Fearne, Ex. Dev. 60.

34. Where there is no express limitation over, to take effect upon the breach or non-performance of the condition annexed to the preceding estate, there, it seems, the condition or proviso is not always construed as a conditional limitation.

Estates may be enlarged on Condition.

35. There is a limitation of another kind which may be considered as an exemption to the rule at common law, that an estate limited to take effect on a condition which is to affect the particular estate is void; namely, those cases where a particular estate is limited, with a condition, that after the performance of a certain act, or the happening of a certain event, the person to whom the first estate is limited shall have a larger estate. For it was resolved in the case of

8 Rep. 74.

Lord Stafford, that such a grant may be good, as well of things which lie in grant, as of things which lie in livery: and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for life or years, which may be merged by the access of a greater estate.

36. But that such increase of an estate by force of such a condition ought to have four incidents.

1°. There ought to be a particular estate as a foundation for the increase to take effect upon; which, Lord Coke held, must not be an estate at will, nor revocable, nor contingent.

2°. Such particular estate ought to continue in the lessee or grantee, until the increase happens, without any alteration in privity of estate, by alienation of the lessee or grantee; though the alienation of the lessor or grantor will not at all affect it: and the

alteration of persons by descent of the reversion to the heirs of the grantor, or his alienee, or of the particular estate to the representatives of the grantee, shall not avoid the condition. Where the grantee dies before the performance of the condition, his heir shall, after he has performed the condition, be in, *quodam modo*, by descent; and such increase need not take place immediately upon the particular estate, but may enure as a mediate remainder, subsequent to an intermediate remainder for life, or in tail, to somebody else.

3°. The increase must vest and take effect immediately upon the performance of the condition; for if an estate cannot be enlarged at the very instant of time appointed for enlargement, the enlargement shall never take place; therefore, though the reversion be in the king, it shall instantly be out of him, upon performance of the condition, and vest in the grantee without petition, or *monstrans de droit*, or other circumstance: for the awaiting such circumstances would frustrate and defeat the enlargement, and the law will never require circumstances to subvert the substance.

4°. The particular estate and the increase ought to take effect by one and the same instrument or deed; or by several deeds delivered at one and the same time, which in effect is the same thing, for *quæ incontinenti fiunt, inesse videntur*; because the particular estate and the increase thereupon, is only a grant to take effect out of one and the same root: and though the increase vest at a different time, yet, when it is vested, it has its force and effect from the same grant.

TITLE XVI.

REMAINDER.

CHAPTER III.

Of the Estate necessary to support a contingent Remainder.

1. *It must be a Freehold.*
11. *Unless the Remainder is for Years.*
13. *A Right of Entry is sufficient.*
17. *It must be a present Right.*
19. *Where the legal Estate is in Trustees, there need no other preceding Estate.*
22. *Both Estates must be created by the same Instrument.*

SECTION 1.

It must be a Freehold.

IT is a general rule, that whenever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it. This arises from the necessity there is for the freehold to pass out of the grantor at the time the remainder is created, for if no freehold passes, then the remainder-man cannot have it. If it passes at all, it must pass either in the particular estate, or in some remainder limited after it; in a contingent remainder it cannot pass, because such remainder, at the time of its creation, passes to or vests in nobody; and if it passes only in some vested remainder limited after the contingent remainder, then is such contingent estate precluded from ever rising at all; for that freehold then becomes vested in possession, which the contingent estate was limited to precede: and of course there is no room left for the introduction of

the contingent freehold. It follows, therefore, that some preceding vested estate of freehold must be limited, to give existence to such contingent remainder.

2. A person devised lands to his son John for 50 years, if he should so long live; and, as for his inheritance after the said term, he devised the same to the heirs male of the body of John. The Court held this devise to the heirs male of the body of John to be void as a remainder, for want of an estate of freehold to support it. Goodright v. Cornish, 1 Salk. 226.

3. But where an estate was limited to the use of the settlor for 99 years, if he should so long live, remainder to trustees and their heirs during his life, remainder to the use of the heirs of his body, &c.; it was held, that the contingent remainder to the heirs of the body of the settlor was good, because it was preceded by a vested freehold remainder to the trustees. Elie v. Osborne, 2 Vern. 754. Doe v. Morgan, infra.

4. There is a case reported by Moore, where A. covenanted to stand seised to the use of himself for life, remainder to B., his brother's eldest son, for life, remainder to the first and other sons of B. in tail, remainder to the right heirs of A. A. was afterwards attainted of treason, and executed, before the birth of any son of B.; and it was resolved, that by the attainder of A., the after-born sons of B. were barred, and that the Crown had the fee simple, discharged of all the remainders limited to the sons of B. not then born. Sir T. Palmer's Case, Moo. 815.

5. Mr. Fearne has observed, that it is extremely difficult to reconcile this resolution with the principle that any preceding vested estate will support a contingent remainder; for here, whatever effect the forfeiture of A.'s estate for life, and remainder in fee,

might otherwise have had, yet as B. had a vested freehold, why was not that capable of supporting the contingent remainders to his sons? There were no reasons given for the resolutions in this case; and perhaps to account for it, we were to recur to the supposed necessity of a seisin in the feoffees, covenantees, &c., to serve contingent uses when they come *in esse*; which principle admitted, it might be inferred, as it seemed agreed that the Crown could not stand seised to a use, that there could be no seisin after A.'s forfeiture to the Crown, to serve the contingent uses to B.'s sons, when they came *in esse*; and that, on that account, they could never take effect.

infra, ch. 5.

Tit. 11. c. 3.

6. If there had been an office found, antecedent to the birth of a son of B., that A. was seised in fee, it might have accounted for the resolution in the above case, by taking away the right of entry of B., according to a distinction which will be noticed in a subsequent part of this chapter. And the determination is contradicted by the two following cases.

Corbet v. Tichburn, Salk. 576.

7. J. S. was tenant for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to the right heirs of J. S. This J. S. committed high treason, and then had a son, and afterwards was attainted. The Court held, that whether the son was born before, or after, the attainder, the contingent remainder to him was not discharged by the vesting of the estate in the Crown, during the life of J. S., because of the wife's estate, which was sufficient to support it.

Cha. 1. § 30.

8. It has been stated, that where there is a limitation to a person for 99 years, if he shall so long live, with a remainder over to a person *in esse*, such remainder is considered as vested. But Mr. Fearne

Cont. Rem. 24.

has observed, that in this sort of limitation, when not by will or by way of use, if the term for years is so short as to leave a common possibility that the life on which it is determinable may exceed it, there should be a present vested freehold estate, to prevent the limitation over from being void, as a freehold to commence *in futuro.*

9. In Lord Derby's case, and that of Napper v. Sanders, a preceding freehold being limited to the feoffees, left no room for this objection. But the case put by Lord Hale stands independent of any preceding freehold; and though it seems capable of being supported upon the principle of a preceding freehold arising by implication, yet there seems to be no occasion for such a resort, because the allowed improbability of the life's exceeding the term of years determinable thereon, appears sufficient to take such remainders out of the description of freeholds to commence *in futuro.* ante, ch. 1. § 31, 2, 3.

10. It is generally true, says Mr. Fearne, that in the case of a limitation to A. for 21 years, if he shall so long live, and after his death to B. in fee, the remainder to B. is void, as being a freehold to commence *in futuro*, viz. after the decease of A., no freehold having been limited, so as to take effect before that period; because, in this case, it is very possible that the period limited for the remainder to take effect from, viz. the decease of A., may not happen till after the determination of the preceding estate, viz. the term of years; in which event the remainder could not take effect at all, as has been already observed. Its taking effect is, therefore, uncertain, in regard of this impossibility of the preceding estate's determining before the event happens, from whence the remainder is to commence; and should it take Cont. Rem. 25.

effect at all, it must be *in futuro*, that is, after the event is decided, on which its taking effect depends. Here, then, there being no preceding freehold limited, the remainder, which must take effect at some future period, if at all, is strictly nothing else than a freehold limited to commence *in futuro*. It is the allowed common possibility of the life's exceeding the term, which creates such a contingency in respect to the remainder's taking effect, as brings that remainder within the description of a freehold limited to commence *in futuro*, and consequently within the direct application of the rule which denies any effect to limitations of that kind.

Unless the Remainder is for Years.

11. As to a contingent remainder for years, there does not appear to be any necessity for a preceding freehold to support it; for the remainder not being freehold, no such estate appears requisite to pass out of the grantor, in order to give effect to a remainder of that sort.

Corbet v. Stone, T.Raym.140.

12. Frances Duchess of Richmond demised certain lands to John Lord Paulet and others, to hold from thenceforth for 40 years, if she lived so long, in trust that she might receive the profits during her life; after her decease, one moiety thereof to Mary Clarke, and the other moiety to Joan Brooke, their executors, administrators, and assigns, for and during the term of 1000 years, from the death of the said Frances.

The Court doubted that the remainders were void; because, 1. They could not pass to them by way of present estate, they not being parties to the deed. 2. They could not be contingent remainders, being remainders for years, depending on an estate for years: and there could not be a contingent estate for years, because a lease for years operated by way of contract; therefore the particular estate and the

remainder operated as two distinct estates, grounded upon several contracts.

Mr. Fearne has observed, that this opinion seemed not to be well considered, and that the Court did not appear to rely upon it, when they said, that, admitting the term of 1,000 years was a contingent remainder, it was, barred by a fine, and a non-claim, after the time of vesting. Cont. Rem. 430.

13. Although every contingent freehold remainder must be supported by a preceding freehold, yet it is not necessary that such preceding estate continue in the actual seisin of its rightful tenant. It is sufficient if there subsists a right to such preceding estate, at the time the remainder should vest, provided such right be a right of entry, and not a right of action only; for whilst a right of entry remains, there can be no doubt but that the same estate continues, since the right of entry can exist only in consequence of the existence of the estate. But when the right of entry is gone, and nothing but a right of action remains, it then becomes a question of law, whether the same estate continues or not; for the action is nothing more than the means of deciding the question. Another estate is, in the meantime, acknowledged and protected by the law, till such question be solemnly determined in a court of justice, upon the action brought. A Right of Entry is sufficient. Fearne, 430. Tit. 29. c. 1.

14. If A. be tenant for life, with a contingent remainder over, and the tenant for life be disseised, all the estates are devested, but the right of entry of the tenant for life will support the contingent remainders. If, however, in a case of this kind the contingent remainder does not vest before such a descent of the estate, from the disseisor to his heir, as will take away the entry of the tenant for life, 1 Rep. 66 *b*. Fearne, 431. Lloyd v. Brooking, infra, c. 6.

1 Ld. Raym. 316. within the statute 32 Hen. VIII. c. 33. and drive him to his action, then is the contingent remainder gone;

Tit. 29. c. 1. because there no longer subsists any right of entry to support it, that right being turned into a right of action.

Tit. 2. ch. 2. § 6. 15. It has been already stated, that a tenant in tail may alienate his estate by certain modes of conveyance, so as to take away the entry of the issue in tail, and drive him to his action; which is called a discontinuance. From which it follows, that where a contingent remainder is limited after an estate tail, and the tenant in tail creates a discontinuance, the contingent remainder will be destroyed.

1 Rep. 135 *b.* 16. The following case arose in 11 Rich. II. A gift in tail was made to A. C., the remainder to the right heirs of A. S. The donee made a feoffment to B. in fee, and afterwards A. S. died. His right heir shall never have the remainder; for the estate of the land was, by the feoffment of the tenant in tail, devested and discontinued; and there was not any particular estate *in esse*, or in right, to support the remainder: for by the feoffment of the tenant in tail, his right was utterly gone. If tenant in tail was disseised, and died, that would not destroy the remainder; for there a right to the particular estate remained, to support the right of the remainder: but when the tenant in tail made a feoffment, no right remained in him.

It must be a present Right.

Fearne, 433. 17. The right of entry to support a contingent remainder must be a present right; a future one will not do. It must also precede the contingency, and be actually existing when that happens; for if it only commences at the same instant with it, the remainder, it seems, will not vest.

18. A right of entry only will not support a contingent remainder limited by way of use: there must

be an actual entry; of which the reason will be given in a subsequent chapter.

Where the Legal Estate is in Trustees, there need no other Preceding Estate.

19. Where the legal estate is vested in trustees, there is no necessity for any preceding particular estate of freehold to support contingent remainders, because the legal estate in the general trustees will be sufficient for that purpose.

Tit. 12. ch. 1.

20. Thus, in the case of Chapman v. Blisset, it was held by Lord Hardwicke, that if the limitation to Joseph's children was a contingent remainder, the legal estate in the trustees would support it.

Hopkins v. Hopkins, Forrest, 44.

1 Ves. 268.

1 Atk. 581.

21. A. devised to trustees and their heirs, to the use of them and their heirs, in trust for B. for life, remainder to his first and other sons successively in tail, remainder to the future sons of C. successively for life, remainder over. B. died without issue in the testator's lifetime. The contingent limitations were taken as executory devises, because no child was then born to C. Afterwards a child was born to C., and died; a subsequent remainder-man claimed the estate, upon a supposition that all the preceding intermediate limitations, which could not vest at the death of such child, were destroyed; as it had been decreed, that upon the vesting of the executory devise in that child, the subsequent limitations became contingent remainders, upon that executory devise. But it was held, that the inheritance in the trustees was sufficient to support the intermediate contingent remainders, till they should come *in esse*, although there was no particular estate to support them; and that the estate should not vest in possession whilst an object of any preceding limitation might come *in esse*.

Gale v Gale, 2 Cox. Rep. 136.

Both Estates must be created by the same Instrument.

22. The estate supporting, and the remainder supported, should both be created by one and the same deed or instrument; therefore an estate for life given

by one deed, will not support a remainder given by another: nor an estate for life settled by A. on B. by deed, enure to support a contingent remainder given by the will of A.

Fearne, 446.

Snow v. Cutler, Raym. 162.

23. A woman being tenant for life, her husband devised the same estate to the heirs of her body, if they attained fourteen years. The Court held, that this was no remainder, but an executory devise; for though the wife had a preceding estate for life, yet this was a new devise, to take effect after her decease, and was not a remainder joined to a particular estate.

Moor v. Parker, 4 Mod. 316.

24. A. being tenant for life by marriage settlement, remainder to his wife for life, remainder to his first and other sons by that marriage in tail: his father, the reversioner, by his will, after reciting the settlement, devised the lands to the first and other sons of A. according to the settlement; then if A. should die without issue of that marriage, he devised to the first and other sons of A. by any other wife, in tail male; and if A. should die *without issue*, then he devised that all the land should go to his grandchildren by his daughter P. in fee.

It was contended that A. took an estate tail under this will by implication, and of course the remainder over in fee was well supported: but the Court held it was impossible to make this an estate tail in A., for nothing was given to him by the devise, so that he had only the estate which he took under the first settlement. That there being two several conveyances, the devise could not be tacked to the estate for life, which was limited by another conveyance; even admitting that the word issue could be an implication of an estate to the heirs of the body of A.

Tit. 38. c. 10.

Weale v. Lower, Pollex. 66.

25. A person made a feoffment to the use of himself for life, and after the death of A., and M. his

wife, to the use of B., eldest son of A., for his life; this was held to be a contingent remainder in B., being created by the same deed as the particular estate. But though it did not appear in the case, yet it afterwards appearing upon examination that by a former deed M. had an estate for life, Lord Hale said the remainder should not be contingent; but the mentioning that the commencement thereof should be after the death of M., was only expressing when B. should take the profits in possession, and did not make a contingency; this not being a remainder created by that deed, but a conveyance of the then subsisting reversion or remainder expectant on the death of M.

26. In a modern case, where a person having granted an estate to his eldest son for life, afterwards by his will, reciting that he had settled that estate upon his eldest son for his life, proceeded in these words,— "My will is, and I do hereby, from and after his decease, give and devise the same to the heirs male of his body begotten; and in default of such issue, to the use and behoof of my second, third, fourth, and fifth sons, severally, successively, and in remainder, and of the several heirs male of the body of my said sons, &c."

Doe v. Fonnereau, Doug. 486.

The Court held, that the limitation to the heirs male of the body of the eldest son was not a contingent remainder.

TITLE XVI.

REMAINDER.

CHAP. IV.

Of the Time when a Contingent Remainder should vest.

2. *A Contingent Remainder must vest during the particular Estate.*
7. *Or at the Instant when it determines.*
10. *Posthumous Children take as if born.*
17. *A vested Remainder may take Effect, though the preceding Estate be defeated.*
19. *A Remainder may fail as to one Part, and take Effect as to another.*
22. *A Remainder may take Effect in some, though not in all.*

Section 1.

WE are now to consider the time at which it is requisite a contingent remainder should vest in interest; that is, at what period, with respect to the duration of the preceding estate, the contingency upon which such remainder is limited to take effect, ought to happen.

A Contingent Remainder must vest during the particular Estate.

2. It is not only necessary that a vested legal freehold estate should precede a freehold contingent remainder, but some such preceding freehold estate must subsist and endure till the time when the contingent remainder vests; that is, till the contingency comes to pass: for it is a general rule that every remainder must vest during the particular estate, or else at the very instant of its determination. So that if a lease be made to A. for life, and after the death of A. and one day after, the land to remain to B. for life, this remainder to B. is void; because it cannot

Plowd. 25.

take effect immediately upon the determination of the preceding estate.

3. This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval, when there should be no tenant of the freehold to do the services to the lord, or answer to strangers *præcipes;* as well as to preserve an uninterrupted connexion between the particular estate and the remainder, which, in the consideration of law, are but several parts of one whole estate. Tit. 1. § 36.

4. If therefore a lease for life be made, with remainder to the right heirs of J. S., this remainder will never vest, if the tenant for life dies before J. S.; for in that case the particular estate determines before the contingency comes to pass, on which the remainder is limited to take effect, that is, the death of J. S., for *nemo est hæres viventis.* 1 Inst. 378*a*.

5. So, where A. seised of lands in fee, makes a lease for years to B., remainder in tail to C., remainder to the right heirs of B.; in this case B. has nothing in the fee; but it is a contingent remainder to his heir; for B. did not take the freehold. If C. dies without issue in the lifetime of B., the remainder becomes void; for the foundation and support of this contingent remainder fails, because it ought to have a freehold to support it, when the remainder falls out; but by C.'s death without issue, living B., the freehold is expired before B. can have an heir, and therefore the remainder will never take effect. Jenk. 248. 2 Roll. Ab. 418.

6. A testator devised to his wife for life, remainder to E. his son for 99 years, if he should so long live; after the deceases of the wife and of E. his son, to the heirs of the body of the said E., but not to descend entirely unto E.'s eldest son, but that E. might Doe v. Morgan, 3 Term Rep. 763.

appoint the same to all his children living at his death; in default of appointment, then to his sons as tenants in common in tail, remainder to his daughters, remainder over. The mother died in the lifetime of E. the son; held, that the limitation to the issue of E., being a contingent remainder, failed by the death of the mother (who had the only preceding estate of freehold) in E.'s lifetime, for want of a continuing particular estate of freehold to support it.

Or at the Instant when it determines.

7. Although no interval is admitted between the determination of the particular estate, and the vesting of the remainder, yet a remainder may be so limited as not to vest till the very instant on which the particular estate determines.

1 Inst. 298 *a*.

8. Thus, if an estate be limited to B. during the life of A., remainder to the heirs of the body of A., this is good; though such remainder cannot vest till the very instant on which the particular estate determines.

Id. 378 *b*.

9. So, if land be given to A. and B. during their joint lives, remainder to the right heirs of him who shall die first, this remainder will be good, though it cannot vest before the determination of the particular estate.

Fearne, 464.

10. If there be no particular estate *in esse*, nor any present right of entry, when the contingency happens, although the particular estate be afterwards replaced and restored, yet will the remainder never arise. Only it seems that the reversal of a fine by act of parliament will restore a contingent remainder destroyed by that fine, though a reversal for error will not.

infra. c. 5.

Posthumous Children take as if born.

11. In consequence of the principle, that where the event on which a contingent remainder was limited to take effect, did not happen by the time at

which the preceding estate determined, it never could arise, or take effect at all. If an estate was limited to A. for life, remainder to his first and other sons in tail, a posthumous son of A. could not take; it was therefore the antient practice, in settlements on unborn sons, to insert a remainder to the intended wife, *ensient* at the death of her husband, and her assigns, till the birth of one or more posthumous sons; and from and after the birth of any such posthumous sons, to every of them successively in tail. Booth's Op. Touchstone.

John Long devised lands to his nephew Henry for life, remainder to his first and other sons in tail, remainder to his nephew Richard for life, &c. Henry died without issue, leaving his wife *ensient* with a son. Richard entered as in his remainder, and afterwards the posthumous son of Henry was born. His guardian entered upon Richard, and it was held by the Courts of Common Pleas and King's Bench, that nothing vested in the posthumous son, because a contingent remainder must vest, during the particular estate, or at the moment of its determination. Reeve v. Long, Salk. 227.

On an appeal to the House of Lords, this judgement was reversed, against the opinion of all the Judges, who were much dissatisfied.

12. The hardship of the determination of the Court of King's Bench, and the discontent of the Judges upon its reversal by the Lords, produced the statute 10 & 11 Will. III. c. 16.; which enacts, "That where any estate shall by any marriage or other settlement be limited in remainder to, or to the use of the first and other son or sons of the body of any person, with any remainder or remainders over, to or to the use of any other person or persons, or in remainder to the use of a daughter or daughters, with any remainder or remainders to any other person or persons; that

any son or sons, daughter or daughters, of such person or persons, that shall be born after the decease of his, her, or their father, shall and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or daughters, in the same manner as if born in the lifetime of his, her, or their father."

13. It is somewhat singular that this statute does not mention limitations or devises made by wills. There is a tradition, that as the case of Reeve v. Long arose upon a will, the Lords considered the law to have been settled by their determination in that case; and were therefore unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, the words of the act may be construed, without much violence, to comprise settlements of estates made by wills, as well as by deeds.

Bull. N. P. 135.

4 Ves. 342.

14. In a modern case, Lord Roslyn said,—"The case of Reeve v. Long, certainly over-ruling Archer's case, had decided that a posthumous child was to be taken to all intents and purposes as born at the time the particular estate determined: it was observed, the decision of that case was contrary to the opinion of the Judges. Undoubtedly the Court of Common Pleas first, and, upon a writ of error, the Court of King's Bench, held differently. But it ought always to be remembered, it was the decision of Lord Somers; and that was not the only case in which he stood against the majority of the Judges; and the better consideration of subsequent times has shown, his opinion deserved all the regard generally paid to it. What followed was not, as it has been inaccurately stated, that the opinion being against that of the ma-

jority of the Judges, it was supposed the Judges would go against that decision. The statute of William III. was not to affirm that decision: it did by implication affirm it; but it established that the same principle should govern the case where the limitation was by deed of settlement.

"The manner in which the point has been treated ever since the case of Burdett v. Hopegood, and the other cases, from the time of Lord Cowper to that of Lord Hardwicke, proves what the opinion has been upon the propriety of a rule, which it is impossible to say is attended with real inconvenience, and which is according to every principle of justice and natural feeling." 1 P. Wms. 486.

15. A posthumous child is entitled, under the statute 10 & 11 Will. III., to the intermediate profits of the lands settled, as well as to the lands themselves.

16. A bill was brought by Basset, an infant, against his uncle, to have an account of the real and personal estate of his father, upon which several questions arose. The first related to the real estate, and was this: Basset v. Basset, 8 Vin. Ab. 87. 3 Atk. 203.

J. P. Basset, father of the infant, settled the bulk of his estate on himself for life, remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons, remainder to his brother, who was the defendant. Basset the father died, his wife *privement ensient.* Basset the uncle entered. Eight months after, the son was born, and entered upon his uncle; the question was, who should have the intermediate profits from the death of the father to the birth of the son.

Lord Hardwicke.—"As to this point, it must depend upon the construction of the statute 10 & 11 Will. III.; and as to that, it must be considered what was the

mischief intended to be remedied, and what remedy the legislature have applied. Now the defendants say, nothing was intended to be remedied but the vesting of the remainder, which they say was the only evil complained of in the case of Reeve v. Long in the House of Lords, which was the foundation and occasion of that act. But I am of opinion this was not the single mischief that was intended to be prevented, but the whole evil; and they meant not only to give posthumous children power to enter, but to take the profits also, according to the intention of persons making settlements, and wills too, of this kind; and this appears both from the title, preamble, and provision of the statute; and the words are so plain, that to put any other construction upon them, would be to repeal the act; which says, such posthumous child shall take in such manner as if born in the life of his father. But it was said by the defendant's counsel, that the words *take, &c.* meant only that he should take the remainder in such manner as heirs at law by descent take, who have not intermediate profits; and that this being a new law, ought to be considered according to the rules of the common law in similar cases; and it is true it is a usual manner of construing new acts, according to the old rules, but to do so in this case would be repugnant to the words of the act, for heirs by descent do not take as if born in the life of their father: But the addition of these words in the act, "although no trustees to preserve contingent remainders," clears this of all objections; and as before that act all accurate conveyancers inserted such limitations, so since, they have left them out, which plainly shows their sense of the statute. But the objections on the part of the defendant are these, that there must be some tenant to the freehold,

somebody to answer the *præcipes* of strangers, and this can be nobody but the uncle. As to this I do not know whether it is material for me to consider it, because I can get at it in another way: but judges in such cases must mould and frame such estates as are agreeable to the plain intention of the legislature. It may vest in the uncle, and devest upon the birth of a son by relation; and this is agreeable to the construction of law in other instances, as in the case of enrolment of deeds; here, though a person has no title till enrolment, yet from the enrolment, he is in from the time of the execution of the deed.

"As to the objection that there is no legal remedy for the profits against the uncle, I think, if my construction is right, the son might bring an ejectment, and lay his demise to the time of the death of his father, and every body would be estopped to say that he was not born in the life of his father; for how could the defendant take the objection, not till he had entered into the common rule; and though it is at the plaintiff's peril if he lays his demise before his title accrued, yet if my construction is right, his title did accrue, and it would be immaterial whether he could or could not in fact make such demise, because such demises are only looked upon as matters of form, and not real, for infants make such demises every day. But suppose this point of law was otherwise, I am of opinion this Court would make the uncle a trustee for the infant, and that seems to me to be the meaning of the act of parliament; and though it is natural to pursue legal remedies, where such are to be had, yet that is no reason, if they are not to be had, why remedies should not be enforced here. I am therefore of opinion the intermediate profits of the estate must go to the infant."

A vested Remainder may take Effect though the preceding Estate be defeated.

17. There are some few instances of vested remainders taking effect, though the preceding estate be defeated; as where the lessor disseises A. his lessee for life, and makes a lease to B. for the life of A. remainder to C. in fee; here, though A. enters and defeats the estate for life, the remainder to C. is good for having been once vested by a good title, it would be unreasonable that the lessor should have it against his own livery.

1 Inst. 298 *a.*

Idem.

18. So if a lease be made to an infant for life, with a remainder over; if the infant at his full age disagree to the estate for life, yet the remainder is good, having once vested by a good title.

A Remainder may fail as to one part, and take Effect as to another.

19. From the principle that a contingent remainder must vest at or before the determination of the particular estate, it follows, that an estate limited on a contingency may fail as to one part, and take effect as to another, wherever the preceding estate is in several persons; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive it.

Fearne, 458.

Lane v. Pannel, 1 Roll. Ab. 238. 317. 438.

20. A feme covert and a stranger being joint-tenants for life of copyhold lands, with remainder to the heirs of the body of baron and feme; the stranger surrendered his moiety to the baron and feme, afterwards the baron surrendered the whole to B. in fee. The feme died leaving issue; then the baron died.

The question was, whether the remainder to the heirs of the body of the baron and feme vested in the issue. It was adjudged, that when the stranger conveyed his moiety to the baron, the jointure between the stranger and the feme covert was severed; when the baron conveyed the whole to B., he took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband), and in the other

moiety, for the life of the stranger; therefore upon the death of the feme the estate in the first moiety was determined, at which time the remainder, as to that moiety, ought to have vested, which it could not do, because the person to take it was to be the heir of the bodies of both baron and feme; but that was impossible during the life of the baron, for *nemo est hæres viventis;* therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all, as to that moiety; so that in this case the remainder failed as to one moiety.

21. Lord Ch. B. Gilbert seems not to approve of the resolution in the above case; for by construing the limitation to the heirs of the body of the husband and wife, a contingent remainder, he says, we suppose a deed made and an estate given, where at the very first it appeared that, for one moiety, the deed and estate could have no manner of effect, unless the husband and wife died at one instant of time. Mr. Fearne says this seems to be a mistake, for the original limitation did not involve any such inconsistency; the inconvenience arose from the subsequent acts. The joint estate for life might have continued unsevered between the wife and the stranger; and on the death of the survivor, there might have been an heir of the bodies of the husband and wife capable of taking when the preceding estate determined; if both husband and wife had died in the lifetime of the stranger; or if both husband and stranger had died in the lifetime of the wife. That the Chief Baron also refers to a case in 3 Leon. 4. of a surrender to the use of the wife for life, remainder to the use of the right heirs of the husband and wife, where the justices were of opinion that the remainder was executed, for a moiety, in the wife. But that was not only superseded by the Ten. 252.

contrary decision in Lane v. Pannel, but was contrary to the preceding case in Dyer 99, 2 Roll. Ab. 416, Dalison 20. pl. 8. cited in 2 Leon. 102.; as well as to the doctrine of the latter cases.

A Remainder may take Effect in some though not in all. Fearne, 460.

22. A contingent remainder may take effect in some, and not in all the persons to whom it was limited; according as some may come *in esse*, before the determination of the particular estate, and others not.

1 Inst. 9 *a.* Comb. 467.

23. Thus, if a limitation be to A. for life, remainder to the right heirs of J. and K.; here, if J. happen to die before A., and K. survive A., the heirs of the first may take, but those of the latter, it seems, will be for ever excluded; for the heirs of J. are *in esse* at the determination of the preceding estate, but not the heirs of K., who is then living.

24. This doctrine however seems confined to limitations at common law; and does not extend to estates created by way of devise.

Ch. 1. § 58.

25. Thus, in the case of Doe v. Perryn, the daughter had no child at the testator's death, but afterwards had three by her said husband, who died in their parent's lifetime. One point contended for was, that the limitation being to the children in fee, was contingent till the death of the mother; therefore the remainder over took effect on her leaving no child. But it was held that the fee vested in the child first born; afterwards opened and let in those born at subsequent periods.

TITLE XVI.

REMAINDER.

CHAP. V.

Of Remainders limited by way of Use, and Contingent Uses.

1. *Remainders limited by way of Use.*
10. *There must be a particular Estate to support the Remainder.*
15. *Will devest in favour of Persons becoming entitled.*
18. *Contingent Uses.*
20. *Springing Uses.*
26. *Shifting Uses.*
37. *Out of what Seisin they arise.*

SECTION 1.

REMAINDERS, whether vested or contingent, may be limited by way of use, as well as by conveyances which derive their effect from the common law; and remainders are now usually created by conveyances to uses. Remainders limited by way of Use.

2. Thus if a person covenants to stand seised to the use of A. for life, remainder to his first and other sons in tail (A. having no sons at the time), remainder to B. in tail, remainder to the covenantor in fee; a use immediately arises, out of the seisin of the covenantor, to A. for life, and to B. in tail, which are immediately executed by the statute 27 Hen. 8. c. 10. Because in this case there are persons seised to a use, a *cestui que use*, and a use *in esse*: but with respect to the contingent uses limited to the first and other sons of A., they cannot possibly be executed, because there are no *cestuis que use in esse*. The moment A. Wegg v. Villers, 2 Roll. Ab. 769. 2 Sid. 64. Tit. 11. c. 3.

has a son, a use in tail arises to him out of the seisin of the covenantor, who has the reversion in fee of the legal estate in him; and the statute executes the legal estate to such first son, who becomes tenant in tail in remainder of the legal estate, expectant on the determination of A.'s life estate.

3. Where the conveyance operates by transmutation of possession, as in the case of a fine, recovery, or release to uses, other principles have been adopted to support contingent remainders limited in this manner.

4. Thus if lands are conveyed to trustees and their heirs, by fine, recovery, or release, and it is declared that these assurances shall enure to the use of A. for life, remainder to his first and other sons in tail (A. having no son at the time), remainder to B. in fee; in this case the use for life limited to A. and the use in remainder limited to B., are immediately executed by the statute, and converted into legal estates; because there are persons seised to a use, a *cestui que use*, and a use *in esse*. But with respect to the contingent uses limited to the first and other sons of A., they cannot possibly be executed, because there is no *cestui que use in esse*. Whenever A. has a son, then there is a *cestui que use in esse*; a use therefore vests in such son in tail, and the statute transfers the legal estate to that use.

5. As no use however can be executed by the statute, unless there is some person seised to such use, it was much doubted out of what seisin the use should arise to the first son of A. In a case in 17 Eliz. Lord Ch. J. Dyer says—" Although by the words of the statute the freehold of the land, and the fee simple also, which the feoffees receive, are deemed and vested in the *cestui que use* before, yet, *adhuc remanet quæ-*

Brent's Case, Dyer, 340.

dam scintilla juris, et tituli quasi medium quid, inter utrosque status, scilicet illa possibilitas futuri usus emergentis; et sic interesse et titulus, et non tantum nuda auctoritas seu potestas remanet."

6. This doctrine was fully discussed in Chudleigh's case, and Lord Coke reports the opinion of the majority of the Judges to have been—"That the feoffees since the statute had a possibility to serve the future use when it came *in esse*, and that in the mean time all the uses *in esse* shall be vested; and when the future use comes *in esse*, then the feoffees, if the possession be not disturbed by disseisin or other means, shall have sufficient estate and seisin to serve the future use, when it comes *in esse*, to be executed by force of the statute; and that seisin and execution by force of the statute ought to concur at one and the same time. And this case is not to be resembled to cases at the common law, for an act of parliament may make division of estates; and for as much as this division is made by act of parliament, it is not necessary that the feoffees should have their ancient estates. 1 Rep. 137 *a.*

7. They also said that this construction was just, and consonant to reason and equity, for by this construction the interest and power that every one hath, will be preserved by the act; for if the possession be disturbed by disseisin or otherwise, the feoffees will have power to enter to revive the future uses according to the trust reposed in them; and if they by any act bar themselves of their entry, then this case, not being remedied by the act, doth remain as it was at common law."

8. The absolute necessity of supposing some person to be seised to a use, before it can be executed by the statute, was the reason of adopting the doctrine of a possibility of entry, or *scintilla juris*, in the feoffees

or releasees to uses. The framers of the statute of uses do not appear to have had contingent uses in contemplation when they penned the act, otherwise they would probably have inserted some clause respecting them; and when a case of contingent uses arose, this fiction was recurred to in order to support them. But in Chudleigh's case the Judges were not unanimous in this opinion, for Lord Ch. Baron Periam and Justice
1 Rep. 132 *b.* Walmsley held that the intent of the statute of uses was, to devest the whole estate out of the feoffees, conusees, or recoverors, and to vest it in the *cestui que use*; so that it would be against the meaning and the letter of the law also, to say that any estate, or right, or *scintilla juris*, should remain in the feoffees; and the Chief Baron said, that this *scintilla juris* was like Sir Thomas More's Eutopia. That in consequence of the words of the statute of uses, "at any time hereafter shall happen to be seised," the seisin which the feoffees had at the beginning, by the feoffment, would be sufficient within the act to serve all the uses, as well future, when they came *in esse*, as present; for there needed not many seisins, nor a continued seisin, but a seisin at any time. So a seisin at one time would suffice; for the statute said "seised at any time," and it would be hard, when
1 Leon. 258. the statute required but one seisin, at one time only, that many seisins, and at several times, against the intent and letter of the statute, should be required.

9. The doctrine that contingent remainders limited by way of use, take effect when they come *in esse*, by means of the possibility of entry, or *scintilla juris* of the feoffees, is said by Lord Hardwicke to depend on such refined and speculative reasonings as are not very easy to comprehend. The consequence of admitting this possibility of entry is, that a right of

Garth v. Cotton, infra, c. 7.

entry alone is not sufficient to support such uses; but that where the preceding estates are devested, there must be an actual entry to restore them. This is a very dangerous doctrine, and will therefore be considered in the next chapter.

There must be a particular Estate to support the Remainder.

10. The rule respecting an estate of freehold being necessary to support a contingent remainder, holds equally in the limitation of contingent remainders by way of use, as by common law conveyances. For although before the statute of uses, a feoffment to the use of A. for years, remainder in contingency, would have been good; because the feoffees remained tenants of the legal freehold; yet, since that statute, it is otherwise, for no estate remains in the feoffees or releasees to uses.

1 Rep. 135 *a.*

Adams v. Savage, Salk. 679.

11. A person conveyed by lease and release to trustees and their heirs, to the use of himself for 99 years, remainder to the use of trustees for 25 years, remainder to the heirs male of his own body, remainder to his own right heirs.

The Court held that the limitation to the heirs male of the body of the releasor was void; because there was no preceding estate of freehold limited to support it.

Davies v. Speed, Show. Parl. Ca. 104. Salk. 675. *n.*

12. Husband and wife covenanted to levy a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, remainder to the use of the right heirs of the husband. They had issue that died in their lifetime; afterwards the wife died, living the husband.

Resolved, that the limitation to the heirs of the husband was void, for want of a preceding estate of freehold to support it; for the husband could not take an estate for life by implication, because the estate belonged to the wife; and supposing an estate for

Tit. 11. c. 4. life in the wife by implication, or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife; yet she, as well as their issue, having died in the husband's lifetime, before the limitation to his right heirs could vest, that must have failed as a contingent remainder, for want of a subsisting particular estate to support it, at the time of his death.

13. It appears from the reasoning in the preceding case, that where the grantor takes a freehold estate by a resulting or implied use, arising from the same deed, it will support a contingent limitation, as effectually as if an estate of freehold had been expressly limited to him.

Tit. 11. c. 4. 2 Freem. 258. 14. So, in the case of Penkay v. Hurrell, after solemn argument on the point, and a case stated to the Judges; it was decreed that the estate for life which resulted to the cognizor, was sufficient to support the contingent limitation to his first and other sons.

Will devest in Favour of Persons becoming entitled. c. 4. 15. It has been stated, that a remainder limited by a common law conveyance may take effect in some, though not in all. But where a contingent remainder is limited by way of use to several persons, who do not all become capable at the same time; notwithstanding it vests in the person first becoming capable, yet it will devest, as to the proportion of the persons afterwards becoming capable, before the determination of the particular estate; and they will take jointly, notwithstanding the different times of vesting.

Tit. 18. c. 1.

Mathews v. Temple, Comb. 467. 1 Ld. Raym. 311. 16. A conveyance was made to the use of A. the husband for life, remainder to the use of B. for life, remainder to all the issues female of their two bodies and the heirs of the bodies of such issues female. A. and B. had issue a daughter. Resolved, that the

remainder in tail to the issues female was not so attached in that daughter, as not to be devested for a moiety on the birth of another daughter; for such a limitation being by way of use, springs out of the estate, according to the capacity of the person in whom it is to vest.

17. Lands were settled to the use of a wife for life, remainder to the use of her husband for life, remainder to the use of all and every their child or children equally, if more than one, as tenants in common, &c., subject to a power of appointment in the parents. It was held, that the remainder vested in the children on their respective births. Doe v. Martin, 4 Term R. 39.

18. Soon after the statute of uses, and even so late as 31 Eliz., it was laid down by Lord Chief Justice Popham, in Chudleigh's case, that no limitation of a use, which was contrary to the rules established at common law, respecting the limitation of legal estates, should be executed by the statute; for, otherwise, all the mischiefs intended to be remedied by the act would be continued, or greater introduced. This idea was however soon departed from, and advantage taken of an expression in the statute of uses, in order to support several of those limitations which had been allowed by the Court of Chancery in declarations of uses when they were distinct from the legal estate. Contingent Uses, 1 Rep. 130 *a*. 134 *b*. 138 *a*.

19. The statute of uses enacts that the estate of feoffees to uses, shall be in the *cestui que use* "after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust that was in them." Now, the Court of Chancery having permitted the limitation of a use for life or in tail to arise *in futuro*, without any preceding estate to support it; and also that a use should change from one person to another, by matter *ex post facto*, Vide Tit. 11. c. 4.

though the first use were limited in fee; the courts of law in process of time admitted limitations of this kind in conveyances to uses; and determined that in such cases the statute would transfer the possession to the *cestui que use*, in the same quality, form, and condition as he had in the use.

Springing Uses.

20. With respect to uses limited to arise *in futuro*, without any preceding estate to support them, which are usually called *springing uses*, the first case in which a limitation of this kind was allowed, appears to have been determined in 10 Eliz., and is thus reported by Dyer.

Mutton's Case, Dyer, 274 *b.*

21. J. M. being seised of certain lands in fee, levied a fine thereof, and by indenture declared the use of it to be to himself, and to such wife and wives as the said J. M. should happen afterwards to marry, by whatever names she or they might be called, for and during their natural lives, and the life of the survivor of them, with divers remainders over. Afterwards J. M. took to wife one A., and then died. Whether she should take any thing by the said indenture or fine, or not, was the question. By the opinion of Wray and Meade, serjeants, and Plowden, and Onslow, solicitor, she might, and thereto they subscribed their names.

517.

Moore states, that the parties not being satisfied with this determination, the case was carried into the Court of Common Pleas, where it was adjudged in the same manner.

Woodliff v. Drury, Cro. Eliz. 439.

22. The next case that arose on this point was in 37 and 38 Eliz., and is thus reported by Croke:—A person made a feoffment, which was declared to be to the use of himself and A. his wife that should be after their marriage, and of the heirs of their bodies; and took A. to wife. The question was, whether the

wife should take by the limitation of this use. Coke, Attorney General, contended that she should not, for presently by the feoffment the fee was in the husband by the possession executed to the use which he had before the marriage; which could not, after the marriage, be divided, and made an estate tail in him, as he had the fee in him till the marriage: for it might have been that the marriage had never taken effect, and that would have confounded the other use; and uses *in futuro* could not arise upon such future acts, for then a use would rise out of a use. But all the justices held, that although he were seised in fee in the mean time, as in truth he was, yet, by the marriage, the new use should arise and vest.

1 Rep. 136 *a.* Brent's Case, and Bould v. Winston, infra, c. 6.

23. It is said by Lord Chief Justice Holt, that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use. In a modern case this doctrine was admitted, and an estate of freehold was allowed to arise *in futuro*, upon a covenant to stand seised to uses.

Salk. 675. 12 Mod. 39.

24. Thomas Kirby being seised in fee of the lands in question, executed indentures of lease and release of them to his brother. The lease was made for a year in the usual manner. The release witnessed, that, for the natural love which Thomas Kirby bore to his brother, and in consideration of 100*l.* paid to him by his said brother, the said Thomas Kirby granted, released, and confirmed to his brother, in his actual possession then being by virtue of the lease for a year, after the death of the said Thomas Kirby, all that close, &c., to hold the same to his said brother, and the heirs of his body.

Roe v. Tranmer, 2 Wils. Rep. 75.

It was admitted that this conveyance was void as a lease and release, because it was a grant of a freehold to commence *in futuro*; but the Court held that it should operate as a covenant to stand seised

to uses; and that the estate should vest in the brother as a springing use.

25. In all cases of springing uses the estate remains in the original owner till the use arises; where there is no transmutation of possession, the springing use arises out of the seisin of the covenantor or bargainor; where there is a transmutation of possession, the new use arises out of the seisin of the feoffee's releasees, &c.

Shifting Uses.

26. With respect to uses limited so as to change by matter *ex post facto*, which are usually called shifting or secondary uses; the following is the first case in which the validity of a limitation of this kind was discussed.

Bro. Ab. Tit. Feoff. al Use, pl. 30.

27. A person made a feoffment in fee to the use of W. and his heirs, until A. paid 40*l.* to W., and then to the use of A. and his heirs. A. paid the 40*l.* Some of the Judges held, that if A. entered, he would become *ipso facto* seised in fee; for W. being seised in fee by the statute of uses, A. would be able to devest that fee, and transfer it to himself, upon performance of the condition. Others were of opinion that the payment of the money and the entry of A. had no effect, without the entry of the feoffees; and then *quacunque via data*, the entry would be good, and A. would become seised according to the terms of the deed. To this it was added, that a use might change from one person to another by some act or circumstance *ex post facto*, as well since as before the statute.

Harwell v. Lucas, Moo. 99. 1 Leon. 264.

28. A., seised of the manor of K., made a feoffment of it to the use of trustees and their heirs, upon condition that if they did not pay 10,000*l.* in 15 days, then it should be to the use of the feoffor and M. his wife, remainder to Thomas their second son in tail, with divers remainders over. The money was not paid. Resolved, that the uses arose, and

at after the death of the feoffor and his wife, homas the second son was entitled to the land.

29. A. levied a fine of the manors of D. and S., and declared the uses by deed; as to the manor of D., to the use of B. and his heirs; and as to the manor of S. to the use of A. and his heirs, until B. should be ejected out of the manor of D. by the wife of A.; after such eviction, to the use of B. and his heirs, until he should be satisfied with the profits of the land for the damages received by the eviction. This was held to be a good contingent use of the manor of S., so that nothing vested in B. till an eviction. Kent v. Steward, 2 Roll. Ab. 792. Cro. Car. 358.

30. A., tenant for life, and R., entitled to the reversion in fee, covenanted to levy a fine to the use of A. and his heirs, if R. did not pay him 10*s.* on the 20th of September following; and, if he did pay it, then to the use of A. for life, remainder to the use of R. in fee. It was held that A. had an estate in fee till R. paid the 10*s.* Spring v. Cæsar, 1 Roll Ab. 413.

31. Mary and Penelope Tannott being seised in fee as coheirs, in consideration of 4,000*l.* paid to Mary by Carew, and of a marriage which soon afterwards took place between Penelope and Carew, the said Mary and Penelope conveyed all their estates to trustees and their heirs, to the use of Carew for life, remainder to Penelope for life, for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Carew and Penelope, successively in tail male, remainder to the daughters in tail, with the ultimate remainder to Carew and his heirs for ever; subject to a proviso, that, if it should happen that no issue of the said Carew by the said Penelope should be living at the decease of the survivor of them; and the heirs of the said Penelope should, within twelve months after the Lloyd v. Carew, Show. Parl. Ca. 137.

decease of the survivor of the said Richard and lope, dying without issue as aforesaid, pay heirs or assigns of the said Carew 4000*l.*; th the remainder in fee simple so limited to t Carew and his heirs, should cease, and the should remain to the use of the right hei said Penelope for ever. It was held, that t good shifting use; and the decree was affirm House of Lords.

32. In settlements made on the younge noble families, there are provisoes frequently that if the family estate and title shall de such younger sons, the estate limited to t cease, as if they were dead without issue, go over to the person next in remainder; shifting use.

33. It is the same where a proviso is in if the person to whom an estate is limited take the name and arms of the settlor, the cease and determine, as if the person so take such name and arms were dead wit and shall go to the person next beneficial in remainder, under the limitations contai settlement.

Vide 1 Inst. 327 *a.* n. 2. 1 Sanders, 146.

Nicolls v. Sheffield, 2 Bro.R.217.

Vide Stanley v. Stanley, 16 Ves. 491.

34. W. Nicolls devised his real estates in trust to receive the rents and profits paying certain annuities, to pay the sur brother, Edward Nicolls, for 60 years, if long live, from and after the expiration term, or the decease of the said Edwa then to stand seised to the use of the fir sons of Edward Nicolls, and the heirs of severally and successively, remainder ove that if the said Edward Nicolls, or the body, should become seised of the estat

Trafford, then the trusts thereby declared for the use of the persons who should so become seised, should cease, determine, and be absolutely void: and the trustees should stand seised to the use of the person next in remainder under his will, in the same manner as he or she would be entitled, if the person so seised of Trafford's estate was or were actually dead. The estate of Trafford came to Edward Nicolls. Held, that the estate which he took under the will ceased, and vested in his eldest son, being the next person in remainder.

35. Thomas Heneage devised his real estates to trustees, to the use of his son, G. F. Heneage, for life, remainder to the use of the same trustees and their heirs, during the life of the said G. F. Heneage, in trust to preserve the contingent uses and estates thereinafter limited; nevertheless, to permit the said G. F. Heneage to receive the rents thereof during his life, remainder to his first and other sons in tail male, remainder over; with a proviso, that if the said G. F. Heneage, or any son of his, should take his elder brother's estate, then the limitations and estates thereby created and given to the said G. F. Heneage and his sons should cease and be void, and the person next in remainder should succeed, as if the said G. F. Heneage, or any such son or sons of his, was or were dead. Doe v. Heneage, 4 Term R. 13.

G. F. Heneage succeeded to the estate of his father's elder brother, before he had any child; but afterwards he had two sons. Held, that the limitation to the trustees to preserve contingent remainders, continued during the whole of the life of G. F. Heneage, so as to support the shifting use; therefore, that the second son of G. F. Heneage took the estate devised.

Fearne Ex. Dev. 5. Doug.R.757.

36. It has been resolved, that contingent uses were only allowed, in order to give persons power to provide for all the exigencies of their families; and that, wherever there was a preceding estate capable of supporting a subsequent contingent limitation, it should be construed to be a contingent remainder, and not a springing or shifting use.

Out of what Seisin they arise. Tit. 11. c. 4. § ante, § 5, &c.

37. Where springing or shifting uses are created without transmutation of possession, they arise out of the seisin of the covenantors or bargainors: where they are created by a transmutation of possession, they arise out of the seisin of the feoffee's releasee, &c.

Opin. Touch.

Thus, Mr. Booth says—"In all future or executory uses, there is, the instant they come *in esse*, a sufficient degree of seisin supposed to be left in the feoffees, grantees, &c., to knit itself to, and support, those uses; so as that it may be truly said, the feoffees or grantees stand seised to those uses, and then, by force of the statute, the *cestui que use* is immediately put into the actual possession."

38. A contingent use cannot, therefore, arise out of the seisin of any prior *cestui que use*. Thus it is

1 Rep. 137 *a.*

laid down by four of the Judges in Chudleigh's case, that if A. enfeoff B. in fee, to the use of C. and his heirs, with a proviso, that if D. pay C. 100 *l.*, then that C. and his heirs shall stand seised to the use of D. and his heirs; this is utterly void; for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cestui que use*.

The doctrine, that contingent uses arise from a seisin supposed to be left in the feoffees, will be considered in the next chapter.

TITLE XVI.

REMAINDER.

CHAP. VI.

How Contingent Remainders and Contingent Uses may be destroyed.

1. *Determination of the particular Estate before the Contingency.*
8. *A Conveyance by way of Use will not destroy a Contingent Remainder.*
9. *Nor a Conveyance by cestui que trust.*
10. *A Forfeiture sometimes destroys a Remainder.*
13. *An Extinguishment of the particular Estate will destroy it.*
15. *And also an Alteration in its Quantity.*
28. *How Remainders limited by way of Use may be destroyed.*
29. *Where created without Transmutation of Possession.*
33. *Where created by Transmutation of Possession.*
38. *How Springing and Shifting Uses may be destroyed.*
49. *Observations on the Doctrine of the* Scintilla Juris.

SECTION 1.

Determination of the Particular Estate before the Contingency.

IT has been already shewn, that a legal remainder must vest in *esse*, or in right of entry, either during the existence of the particular estate, or at the very instant of its determination, otherwise it will never take effect at all; consequently, every such determination of the preceding estate, before the contingency happens, as leaves no right of entry, must effectually destroy such contingent remainder.

1 Rep. 135 *b*.

2. Thus, where a tenant in tail, with a contingent remainder expectant thereon, makes a feoffment of the estate tail, the contingent remainder is destroyed.

3. It is the same where a tenant for life, with a contingent remainder expectant on his estate, makes

a feoffment of his estate for life; it destroys the contingent remainder.

Archer's Case, 1 Rep. 66. Pollexf. 389.

4. Lands were devised to Robert Archer for life, afterwards to his next heir male, and to the heir male of the body of such next heir male. Robert Archer made a feoffment of his estate. Adjudged, that the devise to the heir male was a contingent remainder, and was destroyed by the feoffment; for every contingent remainder ought to vest, either during the particular estate, or *eo instanti* that it determines. If the particular estate be ended or determined, in fact or in law, before the contingency falls, the remainder is void.

Vide Tit. 35 and 36.

5. A fine levied, or a recovery suffered, by a particular tenant, will, in most cases, destroy a contingent remainder, expectant on such particular estate; because such fine or recovery bars and destroys the particular estate.

6. A surrender by a tenant for life of his life estate, will destroy a contingent remainder limited upon such estate for life.

Thompson v. Leach, 2 Salk. 427. Fearne, 468.

7. A person was tenant for life, with remainder to his first and other sons in tail, remainder over in tail. The tenant for life, before he had a son, surrendered his life estate to the person in remainder. The tenant for life afterwards had a son; and the Court held, that the surrender, if good, would have destroyed the contingent remainder to the unborn son. But the surrender was adjudged void, because it appeared that the tenant for life was *non compos* at the time he made the surrender.

A Conveyance by way of Use will not destroy a Remainder.

8. If there be tenant for life, with contingent remainders thereon, a bargain and sale, or lease and release, by the tenant for life, will not destroy the contingent remainders; because these conveyances

only transfer what the person seised of the land may lawfully convey, and do not devest any estate. Tit. 32. c. 10.

9. A person who has only a trust estate, cannot, by any mode of conveyance, destroy a contingent remainder expectant on his estate; for the legal estate being in his trustees, there remains a right of entry in them, which will support the remainders. Nor a Conveyance by *Cestui que* Trust. Fearne, 472.

10. There are some acts of a tenant for life, which, though they amount to a forfeiture of his estate, so as to give a vested remainder-man title to enter, if he pleases, yet as they discontinue, devest, or disturb no remainder or subsequent estate, nor make any alteration in, or merger of the particular estate, do not, therefore, as it seems, destroy or affect a contingent remainder, unless advantage is taken of the forfeiture by any subsequent remainder-man. A Forfeiture sometimes destroys a Remainder.

11. Thus, if tenant for life accepts a fine from a stranger, it is a forfeiture of his estate, so as to entitle a remainder-man to enter; and yet it does not displace or devest the remainder or reversion. 1 Inst. 252 *a*. Tit. 35. c. 9.

12. So, where A. was tenant for life, remainder to his first son in tail, &c., remainder to B. for life, remainder to his first son in tail, &c., A., having a son, accepted a fine from B., then made a feoffment in fee; afterwards B. had issue a son. Resolved, that the acceptance of the fine displaced nothing; and though A.'s feoffment displaced all the estates, yet the right of entry in the son of A. supported the contingent remainders. Lloyd v. Brooking, 1 Vent. 188.

13. A contingent remainder may, however, be destroyed by an act, which, though it does not discontinue or devest any remainder or subsequent vested estate, yet extinguishes the particular estate on which the contingent remainder depends. An Extinguishment of the Particular Estate will destroy it.

ante, § 7.

14. This has been already seen in the instance of a surrender to the person entitled to the next estate in remainder. So where a feme covert was tenant for life, with remainder to her first son, and before the birth of a son, the remainder in fee was conveyed to the husband and wife by fine. Held, that the contingent remainder was destroyed by the extinguishment of the particular estate.

Purefoy v. Rogers, 2 Saund. 380. 4 Mod. 284.

And also an Alteration in its Quantity.

15. It has been frequently laid down, that any alteration in the nature of the preceding estate, before the remainder vests, will destroy such remainder.

4 Leon. 237.

16. As if lands be given to A. in tail, and if J. S. comes to Westminster Hall such a day, remainder to J. S. in fee. It has been said, that if the lands descend to two coparceners, who make partition, the fee shall not accrue to J. S., though he should come to Westminster Hall at the day. It has also been said, that if lands be given to A. and B. for the life of C., remainder to the right heirs of A. and B., and A. releases to B., the remainder is destroyed. But notwithstanding these *dicta*, Mr. Fearne was of opinion that the alteration in the particular estate, which would destroy a contingent remainder, must amount to an alteration in its quantity, and not in its quality. This conclusion he thought warranted by two adjudged cases.

pa. 496.

ante, c. 4. § 20.

17. The first is that of Lane v. Pannel, which has been already stated, where it seems that the severance of the jointure between the two joint-tenants for life did not destroy the contingent remainder, limited after their joint estate; for there it is adjudged, that, because the remainder could not vest at the death of one of them, (after the severance of the jointure,) such remainder was gone, as to one moiety of the lands. Now, this judgement was nuga-

1 Roll. Rep. 238. 317. 438.

tory and groundless, if the severance itself destroyed the remainder as to the whole. This, it is true, was the case of a surrender of copyhold lands, but no distinction was taken on that ground.

18. The other case was, where lands were settled to the use of P. and S. his daughter for their lives, remainder to the use of the first and other sons of S. in tail male, remainder to her daughters, remainder to the heirs of P. Afterwards S., before the birth of a son, by deed, released all her right and estate to the use of P. and his heirs. Harrison v. Belsey, Raym. 413.

The question was, whether the contingent remainder, limited to the first son of S., was destroyed by her release to her father. Adjudged, that this release by one joint-tenant for life to another, did not destroy the contingent remainder.

19. Lord Hale is reported to have laid it down, that in all cases where the particular estate is merged in the reversion, the contingent remainders are destroyed, though there be no devesting of any estate; and the case of Purefoy v. Rogers is cited in support of this opinion. It is however observable, that in the above case the union of the particular estate and the inheritance arose from the conveyance or act of the parties. But where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the *same* conveyance, the contingent remainder is not destroyed: for where by the same conveyance a particular estate is first limited to a person, with a contingent remainder over to another, with such reversion or remainder to the first person as would in its own nature drown the particular estate first given him, this last limitation shall be considered as executed only *sub modo*; that is, upon such condition as to open and separate itself 2 Saund. 386.

from the first estate, when the condition happens; and by no means destroy or preclude the contingent estate.

ante, c. 1. § 51.

20. Thus, in Lewis Bowles's case, it was resolved, that till issue, the husband and wife were seised of an estate tail, executed *sub modo;* that is, till the birth of issue male; then, by operation of law, the estates were divided, and the husband and wife became tenants for their lives, remainder to their issue in tail male, remainder to the heirs of the husband; the estate limited to them for their lives not being merged.

Vide Meredith v. Leslie, Tit. 36. c. 10.

21. Where the inheritance becomes united to the particular estate by an immediate descent from the person by whose will the particular estate and contingent remainders were limited, there the contingent remainder will not be destroyed.

ante, § 4.

22. Thus, in Archer's case, notwithstanding the reversion in fee must have descended on Robert, the devisee for life, upon the death of his father the testator, yet he was adjudged to be only tenant for life, with contingent remainder to his next heir male.

Plunkett v. Holmes, Raym. 28.

23. So, where a person devised lands to T., his eldest son, for life; if T. should die without issue living at his death, then to L., another of the testator's sons, in fee; but if T. should have issue living at his death, then to the right heirs of T. for ever. Resolved, that T. was tenant for life, with remainder in fee in contingency; and that the descent of the fee upon him as heir, at the death of his father, did not destroy the contingent remainder.

2 Bos. & Pul. 295.

24. In a modern case, Lord Eldon observed, that in the case of Plunkett v. Holmes, the Court would not hold that the estate for life, limited to the heir at law, was merged by the subsequent limitation to him

of a contingent remainder in fee; for that remainder was not executed. They held, therefore, that the eldest son took an estate for life; which being sufficient to support the remainder in fee to the second son, and also the remainder in fee to the eldest son, as contingent remainders; they determined that these limitations should be supported, as contingent remainders.

25. Mr. Fearne has observed, that if in the preceding cases it had been determined that the contingent remainders were destroyed by the immediate descent of the inheritance upon the devisee of the particular estate, then the will creating such remainders would be *ipso facto* void; for the particular estate given by such will would be destroyed by the descent which such will permitted. But where the descent of the inheritance on the particular estate is only mediate from the person whose will created the particular estate and the remainder, there can be no such inconsistency in supposing the contingency to be destroyed by the descent; for in all such cases the particular estate is created and takes effect with a capacity of being afterwards destroyed by those accidents to which the nature of such an estate is generally subject; such as forfeiture, merger, &c. Its immediate destruction is not necessarily involved in the mode of its creation, as it must in the former case, under the same construction. There can be no necessity therefore to exempt the particular estate in these cases from the operation of merger by descent, in order to give such particular estate any existence, as there is in the former case. pa. 503.

26. A. the father being tenant for life, remainder to his son B. for life, remainder to the first son of B. in tail, remainder to the heirs of the body of A. Kent v. Harpool, 1 Vent. 306. T. Jones, 76.

Before B. had any son, A. died. The Court held that the contingent remainder to the first son of B. was destroyed by the descent of the estate tail upon B.

Hooker v. Hooker, Rep. temp. Hardw. 13.

27. Lands were conveyed to the use of A. and his wife for life, remainder to the use of B. the son of A. for his life, remainder to the first and other sons of B. in tail, remainder to his daughters in tail, remainder to A. in fee. A. and his wife died in the lifetime of B., who afterwards died without issue, leaving a wife.

Duncomb v. Duncomb, 3 Lev. 437.

The question was, whether the wife was entitled to dower in the lands. Decreed she was; and Lord Hardwicke, with one of the Judges, was of opinion that the estate for life in B. was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.

How Remainders limited by way of Use may be destroyed.

28. With respect to the manner in which contingent remainders limited by way of use may be destroyed; a distinction must be made between remainders limited in conveyances operating without transmutation of possession, and conveyances operating by transmutation of possession.

Where created without Transmutation of Possession.

29. As to the first, we have seen that where contingent remainders are created by a covenant to stand seised, or a bargain and sale, the seisin of the covenantor or bargainor supports or feeds the contingent remainders, when they arise; and therefore, if in a case of this kind the covenantor or bargainor conveys away his estate before the event happens on which the remainder is to arise, but without devesting the subsequent estates, or taking away the right of entry of the persons entitled to them, and any of those persons make an entry, the subsequent uses will be revived. For although we have seen that a present right of entry is alone sufficient to support a contin-

gent remainder, created by a common law conveyance; yet as there must be a seisin to a use before it can arise, an opinion has prevailed since Chudleigh's case, that a right of entry is not sufficient to support a contingent remainder limited by way of use, but that there must be an actual entry, in order to restore the seisin out of which the use is to arise: therefore that any conveyance by the covenantor, which devests his estate, and takes away the right of entry, will effectually destroy all contingent uses limited to arise out of such estate, by devesting the seisin from which such contingent uses are to arise.

30. Lord Coke, on the marriage of his daughter with Sir James Villers, covenanted to stand seised of certain lands, to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to the use of the first and other sons of his daughter in tail male, with the reversion in fee to himself. Wegg v. Villers, 2 Roll. Ab. 796. 1 Vent. 188. 2 Sid. 64.

Some time after this settlement was made, Lord Coke by deed, reciting the settlement, granted his reversion to a stranger, without consideration; and soon after he made a feoffment of the lands, with livery of seisin. After the death of Lord Coke his wife entered, and died seised, having survived the daughter.

A question arose, whether the contingent use, which was limited to the first son of the daughter, was destroyed or not, by Lord Coke's grant of the reversion, or his feoffment of the land. After great consideration, it was resolved, that the grant of the reversion did not destroy the contingent remainder; for as it was made without consideration, and the uses of the settlement were recited in it, there was both privity of estate and confidence in the person; so that the Tit. 11. c. 4.

grantee of the reversion stood seised to the former uses. As to the feoffment, it was agreed that it devested all the estates, and among the rest, the seisin of the grantee of the reversion, but did not bar the entry of the grantee of the reversion; therefore, when the wife entered, after the death of Lord Coke, she thereby reinstated all the devested estates, and among the rest, the estate and seisin of the grantee of the reversion; which was the estate and seisin that was to serve the contingent use.

2 Sid. 159.

31. It was held by Lord Chief Justice Glyn, that if in the above case the feoffment had been made before the grant of the reversion, the contingent uses would have been for ever destroyed; for the only seisin which could support them, was that of Lord Coke, which would have been destroyed by the feoffment; but Lord Coke had already transferred that seisin to the grantee of the reversion. If he had not departed with that seisin, the contingent uses must have been for ever destroyed; as no entry by his wife or daughter could have revested the original seisin of Lord Coke; nor could he himself have entered against his own feoffment.

Gilb. Uses, 194.

32. Lord Coke was compelled to make this settlement by an order of the council; but that he might have the power of preserving or defeating the contingent uses, he made this grant and feoffment, with an intention, in case he chose to preserve the contingent uses, to destroy the feoffment and produce the grant: but if he thought proper to defeat the contingent uses, then to destroy the grant, and produce the feoffment. Death prevented him from carrying this ingenious scheme into execution.

Where created by Transmuta-

33. With respect to the manner in which contingent remainders created in conveyances to uses, which

operate by transmutation of possession, may be destroyed, we have seen that in Chudleigh's case a majority of the Judges held that the contingent uses were supported by a *scintilla juris*, or possibility of entry, left in the feoffees or releasees. But that this *scintilla juris*, or possibility of entry, must continue undisturbed till the event happens on which the contingent use is to arise: for if the preceding estates are devested, before the event happens, then the *scintilla juris*, or possibility of entry of the feoffees or releasees to uses, is destroyed, as well as the other estates; and there being no seisin to the contingent use, when the event happens on which it is limited, it can never arise, unless such *scintilla juris*, or possibility of entry, is revested. tion of Possession. ante, c. 5. § 6.

34. It follows, that where particular estates, limited by way of use, are devested, and turned to a right, all subsequent contingent uses are thereby destroyed; unless some of the persons entitled to the preceding particular estates, or the feoffees or releasees to uses, or their heirs, make an actual entry, in order to revest the particular estates; for otherwise the *scintilla juris*, or possibility of entry of the feoffees or releasees to uses being devested, no seisin will exist to the contingent use when it arises, and consequently the statute cannot transfer the possession.

This doctrine however has never been established by any positive judgement, and appears so doubtful, that it will be examined at the end of this chapter.

35. A contingent remainder, limited by way of use, may be destroyed by the destruction of the particular estate, before the event happens on which such contingent remainder is to arise.

Chudleigh's Case, 1 Rep. 120. Poph. 70.

36. Sir Richard Chudleigh enfeoffed several persons of his estate, to the use of the feoffees and their heirs, during the life of Christopher Chudleigh his eldest son, (who had killed a gentleman and fled into France,) remainder to the use of the first and other sons of his eldest son in tail.

Before the birth of a son, the feoffees enfeoffed Christopher Chudleigh of the lands in question in fee simple, without consideration, and with notice of the uses. Afterwards, Christopher Chudleigh had a son; the question was, whether the contingent remainder to him was barred by the feoffment.

It was adjudged, upon solemn argument in the Exchequer Chamber, that there being no son of Christopher to take, when the particular estate determined by the feoffment, which was a forfeiture, the son could never after take; for that a remainder in use ought to vest during the particular estate, or at least *eo instanti* when it determines, as well as a remainder at common law.

Biggot v. Smith, Cro. Car. 102.

37. A person conveyed his lands by feoffment to the use of himself and his wife, and to the heirs of the survivor of them. The husband afterwards made a feoffment of the land, and died.

Resolved, that the right of entry in the wife was not sufficient to support the contingent remainder, and vest it in her on the death of her husband; for the particular estate was not subsisting at the husband's death, when the fee should have vested, because the second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient; for it should have been then actually existing.

1 Ld. Raym. 316.

38. With respect to the manner in which springing and shifting uses may be destroyed, as there must be a seisin to every contingent use when it arises, it follows, that where such seisin is destroyed, before the event happens on which the springing or shifting use is to arise, it will be destroyed. How springing and shifting Uses may be destroyed.

39. A person made a feoffment, to the use of D. his wife for her life; in case the feoffor should survive his said wife, then to the use of the feoffor and such person as he should happen to marry, for their lives, remainder to a stranger in fee. Brent's Case, Dyer, 340 *a*. 2 Leon. 14.

The person in remainder together with the feoffees, by the consent of the feoffor, made a feoffment of the lands to new feoffees, to other uses, and the feoffor levied a fine to the new uses.

D. the wife of the feoffor died; afterwards he married a second wife, and died. The second wife entered, claiming under the first feoffment. Mounson and Harper were of opinion that her entry was lawful. But Dyer and Manwood contended that the contingent use limited to her by the first feoffment, was destroyed by the second feoffment and fine; because the seisin of the first feoffees was thereby devested. Judgement was entered for the widow by assent of the parties: but in Chudleigh's case Anderson is reported by Lord Ch. J. Popham to have said—"And for Brent's case I have always taken the better opinion to be, that the wife cannot take in that case, for the mean disturbance, notwithstanding the judgement which is entered thereupon, which was by assent of the parties, and given only upon a default made after an adjournment upon the demurrer." Popl. 76.

In the same case Lord Coke reports, that Gawdy said of Brent's case—"If the husband makes a feoffment in fee, before the taking wife, the wife shall 1 Rep. 136 *a*.

never take; for the possession and estate of the land is altered, changed, and transferred to the possession of another, before the title of the wife doth accrue. But if no devesting or alteration had been, then the use shall vest in the wife."

Gilb. Uses, 126.

40. A devise of land out of which a future use is limited, will destroy such future use. But a devise of portions out of land will not destroy it; for such a devise does not alter the freehold.

Strangeways v. Newton, Moo. 731.

41. A. levied a fine to the use of himself and his heirs, till a marriage had between B. his son and M., and after to the use of A. for life, remainder to B. in tail, &c. A. by his will devised portions to his daughters out of the land, and died; afterwards the marriage between B. his son, and M. took place.

The two Chief Justices refused, on account of the difficulty, to resolve the case; they however inclined clearly, that if there had been a devise of the land, it would have interrupted the rising of the future use. But they doubted, because he devised portions out of the land only, and did not devise the land itself.

Gilb. Uses, 126.

42. Where future uses are limited, and the freehold is not conveyed away or devested, but only a term for years is limited, or a rent granted out of the lands, the future uses will not be totally destroyed; because the seisin out of which they are to arise is not devested; but such lease or rent will bind the future uses.

Wood v. Reignold, Cro. Eliz. 764.

43. Sir John Russell covenanted by indenture, in consideration of a marriage to be had between him and Lady Russell, to stand seised, to the use of himself and his heirs, till the marriage; after to the use of himself and Lady Russell, and the heirs of his body, remainder over.

Subsequent to the execution of this deed, but before the marriage, Sir John Russell made a lease of the lands for 31 years, to commence from the determination of a former term. The marriage took effect; and upon the death of Sir John Russell his widow entered.

The question was, whether her entry was lawful or not.

Tanfield.—"The point is double. 1. Whether the lease shall destroy the future use. 2. If it shall not destroy it, whether it shall not bind the future use. For it ought to arise out of the estate which the covenantor had at the time of the covenant; which estate ought to continue without alteration till the time that the use shall arise, which is not here, for this is a term in reversion. To the second, this lease made upon good consideration before the use did arise, shall bind it; for the use shall not otherwise be executed, than if it had been at the common law. And a lease made *bona fide* to one who had not notice thereof, shall bind it."

Popham.—"The statute executes only uses *in esse*, and not any contingent uses, until they happen *in esse*; then this use was merely void until marriage, for there was not any new estate in him; and if he after that covenant had made a feoffment, or a gift in tail, to one who had not any notice thereof, it would questionless never have arisen. And as at the common law feoffees might destroy uses *in esse*, so now may he out of whose estate a future use is to be raised; for the freehold is destroyed out of which it should arise; and whether the lease for years should altogether destroy the arising thereof, is not in this case material; but clearly it shall bind the contingent use; and so resolved in Strangewick's case. And at

ante, § 41.

the common law it is clear that the *cestui que use* shall not avoid such a lease made by the feoffees upon good consideration, no more than a contingent use at this day."

Fenner agreed—"that if a freehold be conveyed to one upon consideration, the future use shall not arise; for there is not any person seised to that use when it should arise. But this lease will not destroy or hinder it, for the same freehold remains, and the use is annexed to the lease, and therefore the lease shall not disturb, nor bind it."

Clench—"agreed with him for this last reason; but it was adjourned."

Cro. Eliz. 854.

This case appears to have been again argued in 43 and 44 Eliz., when Gawdy, Popham, and Clench held—"That the lease made (whereout the use did arise) was good, and should bind the future use, as a lease by feoffees, made upon a good consideration, shall bind *cestui que use* at common law. But it shall not destroy the whole future use, but shall stand for the freehold, because the seisin is not changed." And Popham said—"That he had conferred with divers of the other justices at Serjeants Inn, who agreed with this opinion." But Fenner, *è contra*—"Because the lease did not disturb the freehold when the use is executed, this shall relate to the limitation, and shall bind all mesne acts; and therefore shall not bind the feme as to her jointure: wherefore it was adjourned."

Barton's Case, Moo. 743.

44. In another case, which was argued about the same period, Popham and Anderson appear to have been clearly of opinion that a lease for years would prevent the arising of a future use. But in the following case the contrary doctrine seems to have prevailed.

45. Sir H. Winston covenanted by indenture, in consideration of natural love and affeetion to William Winston his eldest son, to stand seised to the use of his said son for life, remainder to such wife as he should marry, for life, remainder over. Afterwards the said W. Winston being unthrifty, and in Gloucester gaol, Sir H. Winston, to disturb the rising of the use to the woman whom his son should marry, made a lease of the land for a thousand years to his younger son. W. Winston married the gaoler's daughter, and died without issue. The question was, whether this lease was good against his widow. Bould v. Winston, Cro. Ja. 168.

Croke reports the Court to have been of opinion that the lease should not bind the estate of the wife, because there was a good estate by the first limitation; which, if not destroyed, could not be charged or incumbered, after it was raised; for it had relation to the first covenant, and none had interest to charge it: and that the lease should not destroy it, but must be construed to arise out of the reversion which Sir H. Winston had, and might lawfully charge.

Noy, who has reported this case by another name, says, the Court thought the lease for years did not hinder the rising of the contingent use; but that the lease in this case took effect as a future interest, out of the fee that was in the covenantor, after the estate determined; and at the worst, the wife should have the reversion and rent during her life. Bolls v. Winston, Noy, 122. Gilb. Uses, 138.

46. The determinations in the preceding cases are very unsatisfactory, and are contradicted by others of equal authority.

Thus, where a tenant for life levied a fine to the reversioner in fee, and the uses of it were declared, to the cognizee and his heirs, upon condition that he Smith v. Warren, Cro. Eliz. 688.

would pay an annuity to the cognizor, the tenant for life, and in default of payment, that the use should be to the cognizor for life, and one year more. The cognizee made a feoffment of the land; and it was determined that this feoffment did not destroy the future use, which was to arise upon default of payment of the annuity.

ante, c. 5. § 31.

47. In the case of Lloyd v. Carew, the last in which this point arose, Richard Carew and Penelope his wife levied a fine for the express purpose of destroying the contingent use; and yet the House of Lords determined that the contingent use arose, and that the fine could not bar the benefit of the proviso; for that the same never was, nor ever could be, in Penelope who levied the fine.

Gilb. Uses, 3d edit. 288.

48. In a note to a passage in Viner's Abridgement, by the late Mr. Serjeant Hill, which has been published by Mr. Sugden, he states his opinion, that where a future contingent use was not limited in remainder after a particular estate, but as a springing use after a fee, there no act done by him, who had the base or qualified fee, would destroy it, except in the case of a covenant to stand seised to future uses.

Observations on the Doctrine of the Scintilla Juris.

ante, c. 5. § 5, &c.

49. The doctrine that contingent uses are supported by a *scintilla juris*, or possibility of entry in the original feoffees, releasees, &c., stands only upon the authority of an extrajudicial opinion of a majority of the Judges in Chudleigh's case. It is very strongly combated by Lord Chief Justice Pollexfen, who makes the following observations on the great inconveniences that would follow from its admission.

Hales v. Risley, Pollexf. 383.

50. "If it should now remain in the power of these conusees, feoffees, or covenantors, and their heirs, by

their fine, feoffment, or any other act, to destroy all those contingent remainders, what room and place will there then be for confederacies and contrivances; and the estates of most of the families in England, in respect to their issues and posterity, be put into danger, and into the will and power of strangers and mean persons; such as feoffees and conusees, and their heirs, commonly are.

"How unsafe will it be for any man to meddle with these estates; for it must not only be inquired, what acts have been done by those that had the particular estates, and were esteemed as the owners of the land, and whether these particular estates continued in being till the contingent estates came *in esse;* but it must also be known whether the conusees or feoffees, or their heirs, have done no act before those remainders came *in esse*, whereby these remainders should be destroyed.

"How dangerous will this be to all farmers and tenants that take leases under provisoes and powers of making leases, which are common in all settlements: for if the conusees or feoffees, or their heirs, have done any such act, all their leases and estates will be void: for if there remains any estate or interest in the conusees or feoffees, which must continue in them to supply the uses appointed and declared by these leases, then that estate or interest being defeated, those leases must all be naught."

51. In the Treatise of Equity is the following passage; which is taken from the subsequent part of Lord Chief Justice Pollexfen's argument, in the case above cited. B. 2. c. 6. § 1.

"It was formerly held, that the feoffees, after the statute, had a possibility to serve a future use, when it came *in esse*; and that they should be reputed the donors of all the contingent estates, when they vested: and if the possession was disturbed, the feoffees should have power to re-enter, to revive the future uses, according to their trust; but if they bar themselves of their entry, then this case, not being remedied by the statute, remains at common law. But this opinion has been since contradicted; and it is now held, that, to the raising of the future uses after the statute, the regress of the feoffees is not requisite, and that they have no power to bar these future uses; for the statute has taken and transferred all the estate out of them, and they are as mere instruments: so that contingent uses do now, like other contingent remainders, depend upon the particular estate. For to reduce the estates, conveyed by way of use, to the common law, which all sides agree was the chief end of the statute of uses, nothing ought to be left in the feoffees; no need of any *scintilla juris*, or power of re-entry for the benefit of the contingent uses, nor power in the feoffees to destroy them; but they are mere conduit pipes. And the other conceit was grounded, as it seems, upon a zeal against perpetuities, and contingent remainders, there being at that time no received opinion that the destruction of a particular estate would destroy a contingent remainder, till afterwards in Archer's case it was so adjudged."

ante, § 4.

Cont. Rem. 444, &c.

52. To these authorities, may be added that of the late Mr. Fearne, who appears to have fully concurred in opinion with Lord Chief Justice Pollexfen as to the dangerous consequences that would follow from

the fiction of a *scintilla juris* in the feoffees or releasees, and who therefore contends that, as the statute of uses expressly enacts, that where any person, &c. is seised to the use of others, such other persons shall be deemed and adjudged in lawful seisin, estate, and possession, &c. to all intents, constructions, and purposes in the law, of and in such like estates as they had in the use, &c.; and must not these words, to all intents, constructions, and purposes in the law, be referred to the legal properties, qualities, and capacities of estates of the like degree or measure at common law. If so, the *cestuis que use* become entitled to, and take, by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties, and capacities of estates at common law, of the like degree or measure. Now, one of the legal qualities or capacities of an estate at common law, of the degree or measure of freehold is, that after it is devested and turned to a right of entry, such right of entry will support a contingent remainder: and one of the qualities or capacities of a contingent remainder at common law, is, a capacity of being supported by such right of entry: why then do not a preceding vested use, of the degree or measure of freehold, and a subsequent contingent use, respectively, acquire these legal qualities, properties, or capacities, amongst other qualities or properties of estates of like nature and degree at common law. If they do, it is obvious there can be no necessity for any actual entry by any body, to restore a contingent use, where there subsists a right of entry in a *cestui que use* of a preceding vested freehold to support it; but such right of entry alone will preserve its capacity of

vesting and taking effect. If we deny this, we at the same time deny that the *cestuis que use* have lawful seisin, estate, and possession, &c. to all intents, constructions, and purposes in the law, of such estate, as they have in the use.

TITLE XVI.

REMAINDER.

CHAPTER VII.

Of Trustees to preserve Contingent Remainders.

1. *Invention of.*
6. *Where they join in a Conveyance, it is a Breach of Trust.*
8. *Sometimes not punished for destroying Remainders.*
11. *Sometimes directed to join.*
16. *Such Direction sometimes refused.*
25. *Bound to preserve the Timber, Mines, &c.*

Section 1.

Invention of.

CONTINGENT remainders being liable to be defeated by the alienation or forfeiture of the tenant for life, and also by the various acts before mentioned; a mode of preventing this inconvenience was invented, by limiting an estate to trustees and their heirs, to commence from the determination of the particular estate, by forfeiture or otherwise, in the lifetime of the tenant for life, and to continue during the life of the tenant for life, upon trust to support the contingent remainders afterwards limited from being defeated or destroyed; by which means, if the tenant for life should alien or forfeit his estate, or if it should be merged or destroyed by any other means, the trustees, having a vested remainder, immediately acquire a right of entry, which it has been shown is sufficient to support the contingent remainders. c. 1. § 47.

2. This improvement is generally attributed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who 2 Comm. 172.

retired from the bar during the civil wars, and confined themselves to conveyancing. When, after the restoration, these persons came to fill the first offices of the law, they supported this invention, within reasonable and proper bounds; and thus it was introduced into general use.

3. A limitation of this kind is as necessary where contingent remainders are created by way of use, as where they are limited by a common law conveyance: for if the uses are devested, we have seen that an actual entry by the feoffees or releasees to uses, or by some person having a preceding vested estate, is deemed necessary to revest the contingent uses. And though that doctrine appears very doubtful, yet it is quite clear that a right of entry is necessary in those cases.

Vide Doe v. Heneage, ante, c. 5.

4. It should, however, be observed, that where an estate is limited in a bargain and sale, or covenant to stand seised, to a stranger, upon trust to preserve contingent remainders, it will be void: because no use will arise under these conveyances without a consideration.

Tit. 32. c. 9. & 10.

5. Where the legal estate is vested in trustees, and the contingent limitations are only trusts, there is no necessity to limit an estate to trustees to preserve the contingent estates. It is the same in the case of copyholds, for the estate of the lord will preserve contingent remainders against forfeiture.

ante, c. 6. § 9.

2 Ves. Jun. 209.

6. It was declared by Lord Keeper Harcourt, that where there were trustees appointed by will to preserve contingent remainders, and they, before the birth of a son, joined in a conveyance to destroy the remainders, this was a plain breach of trust; that any person taking under such conveyance, if voluntarily or having notice, should be liable to the same

Where they join in a Conveyance, it is a Breach of Trust.

Pye v. Gorge, 1 P. Wms. 128.

trusts. Though it was objected that this had been only *obiter* said in equity, and that there never was any precedent of a decree in such a case; Lord Keeper said it was so very plain and reasonable, that if there was no precedent in this case, he would make one.

7. A person devised lands to trustees and their heirs, to the use of his sister for life, remainder to the same trustees and their heirs, during the life of his sister, to preserve contingent remainders, remainder to the use of the first and other sons of his sister in tail male, remainder over in fee. Upon the death of the testator his sister entered and married; she and her husband then joined with the remainderman in fee in a feoffment and fine to trustees, to the use of the husband and his heirs. Some time after the trustees conveyed the estate by lease and release to the husband of the devisee for life, in fee; his wife being at that time *ensient* with a son. A bill was filed by that son, after the death of his mother, to have the benefit of the will of his uncle.

Mansell v. Mansell, 2 P. Wms. 678. Forrest R. 252.

It was resolved by Lord King, assisted by Lord Chief Justice Raymond and Lord Chief Baron Reynolds,—

First, That the feoffment and fine by the devisee for life and her husband, did not destroy the contingent remainders to the first and other sons; but that the right to the freehold in the trustees supported them.

Secondly, That when the trustees joined in the lease and release to the husband of the devisee, for life and his heirs, this destroyed the contingent remainders.

Thirdly, That the joining of the trustees to destroy such remainders, was a plain breach of trust; and though this had not been before judicially

determined, yet it seemed to the Court, in common sense, reason, and justice, to be capable of no other construction. For when trustees are appointed to preserve an estate in a family, and for no other purpose, and they, instead of preserving it, do a wilful act with an intent and in order to destroy it; how can this be otherwise than a plain breach of trust, or how can it be rendered clearer than by barely putting the case.

Should the Court hold it to be no breach of trust, or pass it by with impunity, it would be making proclamation that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve.

As to the remedy,—had the premises been conveyed to one without notice, and for a valuable consideration, such purchaser must have held the lands discharged of the trust; and the son of the marriage, who was injured by the breach of trust, have taken his remedy against the trustees only; who would have been decreed to purchase lands, with their own money, equal in value to the lands sold, and to hold them upon the same trusts and limitations as they held those sold by them. But even in case of a purchase, if the purchaser had notice of the trust which the trustees were subject to, as annexed to their estate, such notice would have made him liable to the same trust. So, if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors, and have been liable to the trust, in the same manner as the trustees themselves were. But in the present case it was much stronger, for here was not only notice of the trust, but the conveyance itself volun-

tary, and made to the husband of the tenant for life; so that the lands conveyed by these trustees must remain liable to the same trusts as they were, when the trustees joined in the conveyance.

Sometimes not punished for destroying Remainders.

8. There have been some cases wherein a court of equity has refused to punish trustees for joining in a conveyance to destroy contingent remainders; as where, upon a subsequent remainder to the right heirs, a collateral relation only has been affected by it, there having been no issue of the marriage. For, next after the parties to the marriage, the Court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement; as also where the application to the Court for relief has been made by one who was not at the time, nor possibly ever might be, entitled to the remainder under the words of the limitation.

Tipping v. Pigot, 1 Ab. Eq. 385.

9. Thus, where a settlement was made in consideration of a marriage and 3000*l.* fortune, and for settling the lands in question in the name and blood of the husband; and the lands were limited to trustees in trust for the intended husband for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to the first and other sons of that marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband.

The marriage took effect; the husband and wife, and trustees to support, &c. by fine and conveyance, settled the lands on the husband for 99 years if he should so long live, remainder to trustees during his life to support contingent remainders, remainder to

the wife for her jointure, remainder to the first and other sons of the marriage, remainder over to several other persons. The husband and wife died without leaving any issue.

The plaintiff being heir at law to the husband, brought his bill to set aside the second conveyance by the trustees, as being made in breach of their trust; and insisted that they were trustees, as well for the support of this remainder, as of the remainder to the first and other sons; all being contingent remainders: that such conveyances ought to be set aside, as had been the practice of the Court.

Lord Harcourt held it to be so, as to the first and other sons, who came in and were to be considered as purchasers under the marriage settlement and portion; and said it would be dangerous for any trustees to make the experiment, for that it was most certainly a breach of trust; and if it should ever come in question, he thought the Court would set aside such a conveyance: not but that he said the case might possibly be so circumstanced, as that the Court could not relieve against it. But where relief was to be given in such case, it was only to those who came in and claimed as purchasers, as the first and other sons; but all the remainders after, to the heirs of the body of the husband, and to his right heirs, were merely voluntary, and not to be aided in equity. The bill was dismissed.

Else v. Osborn, 1 P. Wms. 387.

10. A. made a feoffment to the use of himself for 99 years, if he so long lived, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the use of the heirs of his body, remainder to himself in fee. A. having two sons, he and the trustees, together with the eldest son, joined in a feoffment and fine to B. in fee, as a

security for a sum of money. The eldest son died without issue; the second brought a bill to set aside the feoffment and fine.

Lord Cowper said, this was plainly a contingent remainder, being limited to the heirs of the body of A., who could have no heir during his life; and it was plain that the feoffment did, at law, destroy the contingent remainder, in regard the trustees, who had the freehold, joined. But it might be a question whether this was a breach of trust in the trustees. It was true, if the eldest son joined in a feoffment, where the remainder in tail was limited to him, it prevented any breach of trust in the trustees. But here the limitation being to the heirs of the body of A., who could not have an heir of his body during his own life; the joining of the eldest son was not in this case so material; yet it seemed hard when the heir apparent joined, in a case where it would be no breach of trust, if the limitation were to the eldest son, that it should be a breach of trust, in respect to the limitation to the heir. But the trustees appointed to preserve the contingent remainders ought not to join in destroying those remainders, which would be acting the reverse of their trust. He was however of opinion, that the second son, though he had survived the eldest, had no right to a bill in his father's lifetime; for he neither was, nor possibly ever would be, the heir of his father, unless he survived his father, which was uncertain. 2 P. Wms. 683.

11. There are also instances of a court of equity exercising a discretionary power of directing trustees for preserving contingent remainders to join with the tenant for life, or his first son, in barring the subsequent contingent limitations. This, however, has Sometimes directed to join.

only happened under peculiar circumstances, either of pressure to discharge incumbrances prior to the settlement, or in favour of creditors, where the settlement was voluntary, or for the advantage of the persons who were the first objects of the settlement, as to enable the eldest son to make a settlement upon an advantageous marriage.

Platt v. Sprigg, 2 Vern. 303.

12. The defendant, Richard Sprigg, made a mortgage of the lands in question for the term of 1000 years, to secure 1000*l.*, and also confessed a judgement for 150*l.* Afterwards, upon his marriage, he settled the same lands to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his wife for life, remainder to his first and other sons in tail, remainder to his own right heirs. There being no issue of the marriage, Sprigg articled to sell the lands to the plaintiff, who brought his bill setting out these facts; and that the trustees refused to join, and the mortgagee threatened to enter; praying a specific execution of the agreement, and that the trustees might join in conveyances.

Sprigg and his wife, by their answer, set out the settlement, that they had been married six years, and had no issue; confessed the contract with the plaintiff, and that they were willing to perform it. The trustees set out the marriage settlement, and that they were willing to do what the Court should direct, being indemnified.

For the plaintiff, it was insisted, that the settlement being only of an equity of redemption, the mortgagee was not bound thereby, but might enter and foreclose; which would bind, though there should be issue afterwards born; and the husband not being able to redeem, a sale was absolutely necessary, other-

wise the benefit of redemption would be lost, as well to the husband and wife, as to the issue, in case there should be any.

The Master of the Rolls (Sir J. Trevor) decreed the trustees to join, and to be indemnified, the settlement being only of an equity of redemption; the wife being in Court, and examined whether she freely consented thereto or not.

13. J. S., by marriage settlement, was tenant for 99 years, if he should so long live, remainder to trustees and their heirs during his life, to support contingent remainders; remainder to his first and other sons in tail male; remainder to trustees for 500 years, in trust to raise portions for daughters, if there were no issue male. J. S. had issue a son, who being of age, and about to marry, he and his father brought a bill to have the trustees to join in making an estate, in order to suffer a common recovery, that he might be enabled to make a settlement on his marriage. Frewin v. Charlton, 1 Ab.Eq.386.

It was urged, that the trustees were only trustees for the son, and ought to execute estates as he should direct, he having the inheritance in him; and that the end of the trust was to hinder the father from defeating the son of the estate.

On the other side it was said, that these trustees were not only trustees for the eldest son, but were designed as a guard for the whole settlement; that the mother being living, there might be other children; and for the trustees to join, would be a breach of trust.

There being a daughter in this case, Lord Harcourt directed, that upon giving security for the daughter's portion, the trustees should join in the recovery.

Bassett v. Clapham, 1 P. Wms. 358.

14. A person, after marriage, made a voluntary settlement to himself for life; remainder to trustees, to support contingent remainders; remainder to his first and other sons in tail; remainder to himself in fee. He afterwards made a conveyance of his estate to other trustees, for payment of his debts.

The creditors brought their bill, and *inter alia* insisted that the trustees for preserving contingent remainders should join in a sale, to destroy the contingent remainders.

The cause came on by consent, before Sir Joseph Jekyll, who took time to consider of it; alleging, that though in the case of Sir Thomas Tipping, where trustees had joined in cutting off remainders, created by a voluntary settlement, the Court, on a bill brought by a remote relation, had refused to punish them, as distinguishing between a voluntary settlement and one made on a valuable consideration; yet he had not known a precedent where the Court ever decreed the trustees to join in destroying the contingent remainders. This being the reverse of the purpose for which they were at first instituted.

ante, § 9.

Winnington v. Foley, 1 P. Wms. 536.

15. Upon the marriage of the plaintiff, Mr. Winnington, who was the eldest son of Sir Francis Winnington, the family estate was settled upon the plaintiff for 99 years, if he should so long live, remainder to trustees during his life, remainder to the first and other sons of that marriage in tail male, remainder to the first and other sons of any other marriage, remainder over.

Mr. Winnington had, by his lady, who was then dead, one son of age, and for whose marriage he was in treaty. The surviving trustee for preserving contingent remainders being dead, leaving an infant heir, Mr. W. and his son brought a bill against him, pray-

ing that he might be directed to join in making a tenant to the *præcipe*, in order to a common recovery for making a settlement on the son's marriage.

On the hearing, Lord Parker declared, that the trustee being appointed to preserve contingent remainders, and here being a vested remainder in tail, if this were for the good of the family, he did not see but such trustee might lawfully join; and referred it to the Master to state whether this was for the good of the family.

The Master reported, that the son was in treaty for the marriage above mentioned; that it was a beneficial marriage for the family; and that it was necessary a new settlement should be made of the estate, which could not be done without a recovery.

Lord Parker said, it might be greatly mischievous to a family if such a trustee should stand out, and not join with the father and son in cutting off the old settlement, and making a new one. This was plainly for the benefit of the family; for by the intended settlement the son was to be but tenant for life, instead of tenant in tail, so that it was a means of preserving the estate longer in the family; also the wife of Mr. Winnington the father being dead, there was an end of the contingent remainders by that marriage; as to any remainders by another marriage, no remainder not *in esse* ought to be so much regarded as the remainder in tail, which was actually vested in Mr. Winnington the son. He therefore directed that the trustee should join with the father and son, in order to make a new settlement; and that the Master should direct a proper conveyance, in which the trustee should join.

16. But however the Court of Chancery may judge it proper to direct trustees to concur in destroying

Such Direction sometimes refused.

contingent remainders, under circumstances like those in the above cases; yet it has repeatedly denied the same interposition in cases where such ingredients were wanting.

Davies v. Weld, 1 Ab. Eq. 386.

17. By a marriage settlement lands were limited to the husband and wife for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male. The husband and wife having been married twelve years, and no issue, and the husband being in debt, they brought a bill, praying that they might be enabled to sell part of the lands for the payment of them; to which the trustee consented, provided he might be indemnified.

Though it was urged that there were precedents of like cases, yet Lord Keeper North refused to make any such decree; saying, he had known people married near twenty years without issue, who after had children.

Townsend v. Lawton, 2 P. Wms. 379.

18. By a settlement on the marriage of the defendant, John Lawton, senior, lands were limited to his use for 99 years, if he should so long live, remainder to trustees, of which Mr. Montague was the survivor, for the life of John Lawton, senior, to preserve contingent remainders, remainder to his wife for life, remainder to the first and other sons of the marriage in tail male, remainder over.

The wife was dead; and the defendants Edward and John Lawton were the only issue of the marriage. John Lawton the father having mortgaged the premises to the plaintiff, and Edward Lawton the son being come of age, the father and son entered into articles with the plaintiff, and thereby covenanted that they would suffer a recovery, and procure Mr. Montague the surviving trustee to join therein. But

Mr. Montague refusing, the plaintiff brought his bill to compel a specific performance of the covenant, and that Mr. Montague might join in suffering the recovery.

Lord King asked if the younger brother would consent that the trustees should join; being told that he refused, he said he would not decree the trustee to join; for that he would not take away any man's right. It was insisted that the same was done in the case of Winnington v. Foley, to which he said he would also do so, were the like case to come before him: In that case the trustee was decreed to join, in order to preserve the estate in the family; but in the principal case they would have the same done with a view only to alien. The bill was dismissed. ante, § 15.

19. A bill was brought to compel trustees to join in a sale, which would destroy the contingent remainders in a settlement, the limitations of which were to the husband for 99 years, if he so long lived, remainder to the wife for her life, remainder to trustees to preserve contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband. And the first declaration under it was, that it was the intention of the settlement to make a provision for the children of the marriage. Symmance v. Tattam, 1 Atk. 613.

Lord Hardwicke said there were many cases in which the Court would compel trustees to join in such a conveyance as would destroy contingent remainders; but then it must be in some measure to answer the uses originally intended by the settlement; and had been usually done in the case of old settlements only, as in Winnington v. Foley. But he believed there was no instance where they had compelled such trustees to join with a father, termor for 99 years, and his son, to sell the estate. ante, § 15.

Woodhouse v. Hoskins, MSS. Rep. 3 Atk. 22.

20. Sir John Hoskins devised his real estate to his eldest son Bennett Hoskins for 99 years, if he should so long live, remainder to trustees during the life of Bennett, to preserve contingent remainders, remainder to the first and other sons of Bennett in tail male, remainder to the testator's second son Hungerford Hoskins for 99 years, if he should so long live, remainder to trustees during the life of Hungerford, to preserve contingent remainders, remainder to his first and other sons in tail male, with like remainders to his younger sons, remainder to his own right heirs; and the testator empowered his sons to revoke the uses limited by his will, and to appoint new uses, provided they limited the same to their sons for 99 years, and in strict settlement; with several other powers and directions for the effectuating his intention of preserving the estate in his family.

Bennett Hoskins died without issue; the defendant Sir Hungerford Hoskins coming into possession of the estate, had issue an only son Chandos Hoskins, who had attained his age of 21; and borrowed several sums of money from the plaintiffs, for which he and his son became bound. Soon after the son's being thus bound for his father, articles were entered into between Sir Hungerford and Chandos Hoskins on the one part, and the plaintiffs on the other, whereby, after reciting the debts, and that Chandos was bound for the payment of them, as surety for his father, Sir Hungerford and Chandos covenanted with the plaintiffs to convey the estate in question to them and their heirs, upon trust to sell the same, and apply the money to the payment of their debts, and to pay the surplus thereof to Sir Hungerford.

The bill was brought against Sir Hungerford and Chandos for a specific performance of the articles;

and likewise against the heir of the surviving trustee for preserving contingent remainders, that he should join in a conveyance for making a tenant to the *præcipe*, in order to the suffering a recovery; and also to have the power of revocation declared void as to all the remainder-men under the will of Sir John Hoskins.

Lord Hardwicke.—"Had this case depended upon the power of revocation, I should not have determined it without the assistance of the Judges; but the previous point is, whether the Court will compel the trustees to join in enabling the father and son to suffer a recovery. Indeed thus much use may be made of the power of revocation, that it plainly shews Sir John Hoskins intended to make as strict a settlement as he could, and to preserve the estate in his name and blood as long as he was able; and where clauses of this nature, tending to perpetuities, have been inserted in deeds or wills, it has been a prevailing motive with the Court to supply defects, in other parts of the deeds or wills; and to make as strict a settlement as possible; as was done by Lord Cowper in Stamford and Sir J. Hobart's case upon Serjeant Maynard's will, where trustees to preserve contingent remainders were inserted by the Court. 3 Bro. Parl. Ca. 31.

"It has been admitted in the present case that there is no precedent for such a decree as is prayed by the bill; and I do not think the present case such as will warrant me in making one. Trustees of this kind have often been called honorary trustees, *i. e.* that such a trust is reposed in them as they may exercise at discretion; and that therefore the Court ought not to consider them as guilty of a breach of trust for such exercise of their discretion. But since the case

ante, § 7.

of Mansel v. Mansel, where it was determined to be a breach of trust, and to affect a purchaser with notice, that notion has been laid aside. I will not say that the Court would decree the trustees joining in such a case as the present to make a tenant to the *præcipe*, a breach of trust in them; that being a quite different question.

"It has been said that this kind of settlement, where the father is made but tenant for years, is very inconvenient, and tends to perpetuities; but I do not know that this doctrine has been ever laid down by the Court. To some public purposes these settlements may be inconvenient; however, they were formerly very common, and no objection made to the propriety of them. Now what was the reason of such a limitation; most certainly to preserve the estate longer from alienation than if the father was made tenant for life; because in this last case the father and son might pass by the trustees, and suffer a recovery without them; and therefore the estate was limited for years, to prevent that consequence: and also for that the son being greatly under the father's power for his maintenance, the father might distress and force him to join in selling the estate, where the freehold is in the father; whereas by vesting the freehold in trustees, that consequence is likewise avoided. Now the occasion for suffering a recovery in the present case is considerable. It is not for the making any marriage settlement, nor upon account of any particular misfortune in the family, nor for payment of the son's debts, but for payment of the father's; the son being only a surety for the father, and entering into bonds but just before the making of the articles; and it is very probable the estate was settled in this manner by Sir John Hoskins to guard against the very event

of the son's being drawn into a sale of the estate for payment of the father's debts. It has been said that the son, as tenant in tail, is owner of the estate, and that it is not necessary to make the subsequent remainder-man party to bills relating to his estate. But where a man is only tenant in tail in remainder, and has not the freehold in him, I do not think he is to be considered as owner; and in all cases the owner of the freehold must be before the Court.

"The precedents of decreeing trustees to join in suffering recoveries are not many, and have not gone so far as the present case. In that of Mr. Winnington, the end was the making a marriage settlement, which was carrying on the donor's intention, and not to put the estate out of the family. It was objected, that the trustees joining with the father would be no breach of trust in them, and that the Court would not decree them to make satisfaction, nor affect a purchaser with the trust; and that therefore what is prayed by the plaintiffs' bill should be decreed: but there is a medium between the two propositions, for the Court will not always decree a man to do what would not possibly be a breach of trust in him if he did it. The reasons and motives of a trustee's joining would be considered in determining whether he was or was not guilty of a breach of trust. But as the trust in question was most probably created to prevent the father and son from selling or disposing of the estate, as soon as he came of age, t..e decreeing the trustees to join in suffering a recovery, would be decreeing them to act directly contrary to their trust." The bill was dismissed.

ante, § 15.

21. Francis Barnard devised freehold and copyhold estates to T. C. Barnard for 99 years, if he should so long live, remainder to the defendant Large during

Barnard v. Large, Amb. 774. 2 P. Wms. 674. note.

the life of T. C. Barnard, in trust to preserve contingent remainders, remainder to the first and other sons of T. C. Barnard in tail male, remainder to J. Wall in fee. T. C. Barnard had issue only one son, who attained 21 years, the father and son filed a bill against Large the trustee, and Wall the remainderman, stating that they were desirous of suffering a recovery, and of limiting the estate so as to preserve the contingent remainders to the second and other sons of T. C. Barnard; and praying that Large the trustee might be decreed to join in making a tenant to the *præcipe* for that purpose; submitting to declare the uses of the recovery to the second and other sons of T. C. Barnard, by way of contingent remainders, as limited by the will; and to limit an estate to a trustee, for the purpose of supporting and preserving those contingent remainders.

Sir T. Sewell, M. R., observed, that with respect to remainders to remote relations in settlements, where the persons to whom they were limited were not the immediate objects of the parties, or where they stand in opposition to the first tenant in tail, desiring a reasonable benefit, consistent with the intentions of the creator of the limitations, their pretensions had not been much considered; but in the present case all took as volunteers, and were all equally to be attended to. He then considered the several cases on this subject, and said, that from a view of them all it seemed, that when the eldest son, tenant in tail, is of age, and about to marry, and thereby continue, instead of destroying the purposes of the settlement, and in some cases where there has been particular distress, under particular circumstances, which ought to have induced the trustee to join, the Court had interfered, otherwise not. That in the principal case

he was called upon to disturb the testator's disposition, merely for the sake of disturbing it; for which he saw no reason; and dismissed the bill with costs.

22. It is observable, that in the two last cited cases, a distinction was made between punishing trustees for joining to destroy contingent remainders, and compelling them to join. This distinction seems to flow from the supposing any discretion at all in the trustees; because there may be circumstances sufficient to justify, though short of an obligatory call for such an exercise of their discretion. And Mr. Fearne has observed, that however this may be, it seemed the safest way for trustees not to act, except in the clearest cases, without the direction of the Court of Chancery; and recommends to their discretion the words of Lord Harcourt in Pye v. Gorge, "That it would be a dangerous experiment for trustees in any case to destroy remainders, which they were appointed by the settlement to preserve." Cont. Rem. 493. 2 P. Wms. 684.

23. In the following modern case it was held, that trustees, to preserve contingent remainders, joining in a recovery, was no breach of trust.

24. Upon a bill for the specific performance of a contract for the sale of an estate, an objection was taken to the Master's report approving of the title. Moody v. Walters, 16 Ves. 283.

The abstract stated indentures of lease and release in 1693, previous to the marriage of William Levinz and Anne Buck, by which Sir Creswell Levinz, and William Levinz, his son and heir apparent, conveyed to trustees and their heirs, to the use of William Levinz for 99 years, if he so long lived, with remainder to trustees and their heirs for the life of William Levinz, in trust to preserve contingent remainders; remainder to the first and other sons of the marriage in tail male; remainder, in case William Levinz should

die without leaving any issue male then born and alive, and leaving his wife with child, to such after-born child or children, if a son or sons; remainder to William Levinz, brother of Sir Creswell Levinz, for 120 years, if he should so long live, remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to Sir Creswell in fee. The issue of the marriage was one son, William Levinz, who attained the age of 21 in 1734, and three daughters, one of whom died unmarried.

The abstract further stated, that by indentures of bargain and sale in 1734, William Levinz and his son, and the heir of the surviving trustee for preserving contingent remainders, conveyed to a tenant to the *præcipe*, for the purpose of suffering a recovery, to enure to the use of William Levinz the father for life, remainder to the son in tail general, remainder to the right heirs of the father; with power to the father and son jointly, or the survivor, to revoke the uses, and to sell, or declare new uses.

The plaintiff was seised in fee under conveyances and devises derived from this title. The objection was, that the heir at law of the surviving trustee for preserving contingent remainders in the settlement of 1693, had been guilty of a breach of trust in joining with William Levinz the father and his son in the deed of 1734, for making a tenant to the *præcipe*, for suffering a recovery of the estate, and thereby destroying the remainders, unless the plaintiff could show that William Levinz the younger was dead without issue; and also that there was a failure of issue male of William Levinz, the nephew of Sir Creswell; and also that Sir Creswell did not by his will dispose of the reversion in fee.

Lord Eldon said, it was agreed on all sides that a good legal title to the estate could be made. The question was, whether under the circumstances, that title, good at law, would also be a good equitable title; or, putting it in another shape, whether there was in the year 1784 such a breach of trust committed, in the execution of the conveyance of that date, that supposing any person descended from the son of William Levinz, that person could now, allowing for all incapacities of infancy, or otherwise, claim under the instrument executed in the preceding century; and insist in this Court, that there was that sort of breach of trust upon which he could say that the equitable estate belonged to him, however good the legal title might be in the vendor. Without going into all the particulars that might constitute the equitable title, he would, for the purpose of this question, suppose that a person did exist who might raise the question, notwithstanding the lapse of time.

After stating the several cases on this point, his Lordship said, the difficulty turned upon this, whether it could be represented as the object of a suit in equity to compel trustees to do that, which they ought not to do without a suit; and his notion was, that the act which they were decreed to do, should be such as they ought to do. On what other principle could a suit be entertained. The proposition which appeared in treatises on this subject, most justly regarded with reverence, that trustees were never to join without the direction of the Court, was the result of great caution, but amounted to this, that the Judges of the Court of Chancery were the trustees to preserve all the contingent remainders in the country, and no one could say what was to be done till a decree had been obtained. If the Court meant to

say, trustees to preserve contingent remainders should never join without a previous direction, that proposition ought to be firmly and boldly stated, otherwise trustees were left exposed to all the vexation to which the demands of families would make them liable, and to the difficulty of determining whether a court of equity would direct them to join, or would interpose more or less to defeat the act, and make them responsible. That was a situation in which trustees ought not to be placed; and upon such terms no person would be very ready to lend himself to the most laudable purposes of family settlement, without a previous direction. The principle, therefore, could not be, that the absence of that sanction made the act a breach of trust.

With regard to the questions in this case, whether the Court ought to have declared the act of these trustees a breach of trust in 1734; and whether, supposing there were any issue of William Levinz, the nephew, existing, they could complain of the breach of trust committed at that time; he could find no decree that considered the act of the trustees joining for such a purpose a breach of trust. They in 1734 joined the father and son, to limit the estate to the father for life, instead of 99 years, with remainder to the son in tail general, instead of tail male, without any remainder to the subsequent issue of that marriage, celebrated in 1693; and the existence of future issue, therefore, not very probable; and also, without any remainder to the possible issue of any other marriage, the ultimate remainder was at once limited to the father in fee, with a power of revocation, and the subsequent variations of that, at a period when undoubtedly a valid recovery might have been suffered without the trustees, viz. after the death of the

father; the immediate purpose being to limit part of the estate in possession to the son, having attained the age of 21, not appearing to have any other maintenance, and giving, as Lord Harcourt had done in a much stronger case, to the sister maintenance, and a portion on marriage; the subsequent object being to raise money, not for the father's debts, but the son's; and the subsequent limitations all extending the estate to the sons of that son, if any.

Frewin v. Charleton, ante, § 13.

Under these circumstances, he could not conceive that any complaint at that time could bring before him a case, upon which, collecting the purpose from the use actually made of the recovery in 1734, he should, by the application of the doctrines laid down, so little to be reconciled, be driven to the conclusion that this was not a case in which he was called upon to decree a breach of trust, but involving a very different consideration, whether the trustee was to be made responsible, or that it was by any means probable that this could, against a purchaser, be declared a breach of trust, on the ground of notice. His opinion was, that he could not hold that doctrine; and he should say, with Sir Thomas Sewell, let the law take place.

Biscoe v. Perkins, 1 Ves. & B. 485.

25. Trustees, to preserve contingent remainders, are not only bound to preserve all the limitations created by the settlement, but also to protect the inheritance, and to keep it as entire as possible. Now, as the inheritance consists of land, timber, mines, &c., all these are under the protection of the trustees; and in the execution of this trust they are entitled to every assistance which a court of equity can afford them. And where there is a limitation to trustees to preserve contingent remainders, the Court of Chancery will not permit a tenant for 99 years, if he

Bound to preserve the Timber, Mines, &c.

shall so long live, to join with the person entitled to the inheritance for the time being to cut down timber.

This doctrine is laid down by Lord Hardwicke in a case lately published from his own manuscripts, and which contains so much learning, that it shall be transcribed entire, as it would be impossible to abridge it without omitting some material observations.

Garth v. Sir J. Cotton, Dickens, 183.

26. Richard Bovey Garth being tenant for 99 years, if he should so long live, without impeachment of waste, voluntary waste excepted, with remainder to trustees during his life to preserve contingent remainders, remainder to his first and other sons in tail male, with the ultimate remainder to Sir John Hind Cotton in fee; and, having no children, he entered into an agreement with Sir John Hind Cotton for cutting down part of the timber then standing on the estate, the money to arise from such timber to be divided between Bovey and Sir J. H. Cotton.

A quantity of timber was felled in consequence of this agreement, and Sir J. H. Cotton received a part of the money.

Some years after, Bovey had a son, who, after the death of his father, suffered a recovery, and filed his bill against Sir J. H. Cotton, praying a satisfaction for so much as he had received of the money which arose from the sale of the timber.

Lord Hardwicke.—Upon this case, the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir J. H. Cotton received out of the inheritance by the fall and sale of timber before the plaintiff came *in esse*, and, consequently, before he had any estate in him in the land, and whilst the

emainder, which vested in him afterwards, rested in nere contingency or possibility.

This had been admitted at the bar to be entirely a iew question, upon which there was no precedent, nd which had never been brought into judgement efore: that the plaintiff could have no remedy at law, either in his own name, or in the names of the trustees to preserve contingent remainders; but that the only possible remedy was in a court of equity. This made made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent, after the invention of trustees to preserve contingent remainders.

In order to determine whether the plaintiff was entitled to relief, it would be necessary to take several matters into consideration; to lay down some that were plain, and to clear and establish others, that appeared more doubtful.

First, That the stripping this estate of the timber was a wrongful act, was clear from the nature of the limitations. The plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to, or interest in the timber, other than the mast and shade, and necessary botes. The defendant's father had no present right to cut it down, but in his turn according to the order of limitation. It was true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come *in esse*; and, in that quality, the timber part of the inheritance was vested in him; but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him by injunction; and the plaintiff's father might have brought an action of trespass against him for his entry and tortious act. Further, it was the

duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainder-man, when he should come in *esse*; for between the tenant for years and the lessor, or the remainder-man of the inheritance, there was a privity: and before the statute of *quia emptores terrarum*, a tenure arose, and this made a tenant for years a kind of fiduciary for the lessor, or the remainder-man, who stood in his place. As this act was wrongful, both in the plaintiff's father and Sir J. H. Cotton, so this wrong was committed collusively between them; and it was plain and self-evident, that this wrongful collusive transaction had turned to the loss and damage of the plaintiff.

The next inquiry was, whether the plaintiff was entitled to any remedy in Chancery upon the principles of equity. At law, it was admitted, he could have none. And it must be admitted further, that if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity. Indeed, as the plaintiff's father was only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir J. H. Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no such limitation to the trustees, the plaintiff would even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar, by fine,

ofiment, or surrender to the remainder-man vested: nd there could have been no pretence for this Court o interpose, to preserve or restore to him part of hat inheritance, the whole of which was in the power f the tenant for life; therefore, the stress and foundaion of the plaintiff's equity depends entirely upon the state limited to the trustees to preserve contingent ses, and the consequences from thence. And, in rder to determine concerning the force and operation f this, in the present case, I will consider,

1st, What is the intention and use of creating limitations to trustees for preserving contingent remainders.

2dly, What estate such trustees take in point of law, and what actions they may maintain at common law.

3dly, What is the nature and extent of this trust in equity, and what remedy they may pursue in this Court.

4thly, How far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches, in breach of their trust.

1st, The intention of limitations to trustees to preserve contingent uses, took its rise from the determination of two great cases, reported by Lord Coke in his first volume; Chudleigh's case, Hil. 31 Eliz., and Archer's case, Mich. 39 Eliz.; though it was several years after those resolutions, before that light was struck out; and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures, for what was then called treason and delinquency, was an additional motive to it.

Let us see, then, what were the chasms and defects which wanted to be filled up and remedied in consequence of those two judgements.

The grand dispute in Chudleigh's case was concerning the power of feoffees to uses, created since the statute of 27 Hen. VIII. c. 10., to destroy contingent uses by fine or feoffment, before the contingent use came into being.

In order to determine this, the Judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over; in all those cases, no estate at all is left in the feoffees, but the whole estate is devested and drawn out of them by the statute of uses.

But then came the question respecting the contingent uses to the sons not *in esse*. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of disseisin, or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute, unless there be a person seised to the use, and also a *cestuique use*. And if any disseisin or disturbance of the estate should happen, the right to the use cannot be executed within the statute; therefore, lest these contingent uses should be destroyed, and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the Judges.

Others of the Judges were of opinion, that there was not only no estate left in the feoffees, but no power or right to enter, nor any thing to do with the land, but that they were at first only conduit pipes, and the estate that was in them, was, by the statute, wholly transferred to serve the uses which were *in esse*, with a pregnancy and prospect to the contingent remainders, if they should arise in due time. ante, c. 6. § 49.

It must be observed, that one thing which weighed much with the majority of the Judges to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was, their fear of perpetuities, and of having contingent estates by way of use in persons not *in esse*, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that, at that time, the law was not settled that the destruction of the particular estate by the feoffment, or conveyance of the *cestuique* use for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterwards came Archer's case, in which case this point was solemnly settled, and they were relieved from their apprehensions; for though Archer's case is placed in the reports before Chudleigh's case, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases, is stated by Mr. Pollexfen, in his argument of the case of Hales against Risley, in Pollexfen, 385; from whence I have taken it.

From this deduction, you will see what were the chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses, *ad libitum*; and here was a power in the *cestuique* use for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the *cestuique* use in contingency, in like manner as trustees to uses ought to do before the statute of uses, when they were but trusts to be executed in this Court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the *cestuique* trusts in remainder, either vested or contingent.

Secondly, Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture, or surrender of the first tenant for life, by reason that the limitation being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of Chelmondeley's case, 2 Coke, 5 *a*. where it is held, that if there is a lease to A. for life, remainder to another during the life of A., this is a good remainder; for, by possibility, the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits

any other forfeiture; and so in the Book 41 E. III. Fitzh. Title *Waste*, 83.; and this is followed by the late case of Duncomb against Duncomb, Hil. 7 Wm. III. C. B. 3 Lev. 437., which was one of the first cases wherein the operation of such limitation to trustees to preserve contingent uses came into question.

If this be so, upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant; because, in the last case, it comes the first estate of freehold to the trustees, as was rightly reasoned by Lord Chief Justice Lee, in the case of Smith v. Dormer and Parkhurst. ante, ch. 1. § 48.

It is plain, therefore, that these trustees had the immediate freehold in them, an estate *pur autre vie*; and at law they alone could maintain or defend any action concerning the freehold.

If a disseisin was committed, they must bring the assize, and they must defend in all *præcipes*; for the possession of the tenant for years was, in law, their possession: for this reason, they had in law an interest in the timber; not indeed to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste: the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance; and the statute of Gloucester gave the writ of waste to the same persons. But in this respect, such trustees are in no other condition than all other remainder-men for life.

Thirdly, Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of Mansell against Mansell, which must be more particularly mentioned by and by, it was expressly laid down by Lord Raymond, as I took it from his own mouth: "It is only positive law, that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to preserve them; they are the creature of the Court, and probably under its direction and control."

The first trust is declared to preserve the contingent estates therein-after limited. How to preserve them? To preserve the inheritance as entire as possible, to go according to the succession established by the testator; which inheritance consists of the land, timber and mines, and cannot be preserved entire without preserving all three. In many estates, the timber is the most valuable part; in more, the mines; and the destruction of one, or the exhausting of the other, might take away or be an alienation of the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support any action of waste.

This might, in many instances, be to preserve the shell, without the kernel; and brings it to the question, what remedies they may, in virtue of this trust, pursue in the Court.

These trusts are equally declared, to make entries and bring actions, as the case shall require. Here it

is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity. For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom.

Therefore, if after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a court of equity in support of their trust, and not to break in upon the right of the tenant for life, to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here.

As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case, they were remainder-men *pur autre vie*, and immediate owners of the freehold in law. In the case of Dayrell against Champneys, 1 Ab. of Cases in Equity, 400, a remainder-man for life was admitted to maintain such a bill, without making the owner of the inheritance a party; and although it was observed upon that case by Mr. Clark, that appears by the state of it in the book, that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remainder-men of the legal estate *pur autre vie*, surely their trust, which affects their conscience, and, according to Lord Raymond's opinion, makes them creatures of this

Court, would not make their case the weaker here.

But the books go further, and say, a bill may be brought for an injunction to stay waste, on behalf of an infant *en ventre sa mere.* And so is Musgrave against Parry, 2 Vern. 710. which is liable to much more difficulty; for that must be as *amicus curiæ*, on the unborn child's behalf.

I therefore hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father, and the late Sir John Hind Cotton.

Pursue this then into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled. This had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. Solicitor General * very properly put in his argument:—On what terms should they be discharged? This Court could not have fined them; therefore, certainly, only on the terms of making satisfaction. That satisfaction could not have been by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no pretence to it; nor the remote remainder-man in fee, for he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up and secured to attend the contingent uses; without this, justice could not have been done.

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* Afterwards Lord Mansfield, C. J.

Fourthly, It comes next to be considered, how far and in what cases such trustees may be charged in equity with a breach of trust, or any other person may be affected by their act, or laches, in breach of trust.

Notwithstanding the saying of Mr. Pollexfen, *arguendo* at the bar, (Poll. 250.) "that trustees to preserve contingent remainders were never punished in equity when they broke their trust," (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord Harcourt, in the case of Pye and Gorges, Mich. 1710, where he declared, that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust; and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts;" and he said, if there was no precedent in the case, he would make one. Prec. Ch. 308. 1 P. Wms. 128. 2 Salk. 680.

Then came Tipping against Pigot, in Mich. 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said, it would be dangerous for such trustees themselves to make the experiment. Thus it stood, till the great case of Mansell against Mansell, which was first decreed by Sir Joseph Jekyll, at the Rolls, in January 1731; and afterwards by Lord King, assisted by Lord Raymond and Lord Chief Baron Reynolds, 12th December 1732. 1 Eq. Cas. Abr. 385. Gilb. Eq. Rep. 34. 1 P. Wms. 678. 2 Eq. Ca. Abr. 747.

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable, in equity, to make satisfaction for such a breach of trust; and also, that a

voluntary alienee, or a purchaser for a valuable consideration, with notice of the trust, shall be decreed in equity to restore the estate; and in that case it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance, the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build. Suppose these trustees had consented to the felling and sale of the timber; had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted, that they would bring no bill for an injunction; would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly follows from the principle on which the Court founded itself in Mansell against Mansell. Lord Raymond said, "It was strange, in natural reason, to say, that where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it, which is expressly within the rule of Mansell against Mansell. And here I cannot help repeating some remarkable words of Lord King, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of

trust, and the trustees convey the estate over, a court of equity is not to sit still and let others profit by the spoil."

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only a *laches*, or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme, or attempt to strip the estate of the timber; but how will it excuse the others, who, as Lord King expressed it, have profited by the spoil? By no means.

In all cases of alienations, the alienees are not affected merely by the act of the trustees, but by notice of the trust; and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles: therefore, in this case, the actual notice of the trust operates to make the laches of the trustees affect them, as much as their express act would have done in the other; and it would be strange to say, that the plaintiff's and defendant's father would have been liable for the timber, if the trustees had concurred in the destruction and sale of it; but shall be in a better condition, because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a reconveyance. Indeed it plainly follows, by analogy, from thence.

Suppose an estate, with valuable mines in it unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation with notice: afterwards, such a purchaser, with notice, opens the mines, and exhausts them,

putting a great sum of money into his pocket: then a son is born, who is tenant in tail: the tenant for life dies, and the son brings a bill for a reconveyance. If, according to the authority of Mansell against Mansell, the Court had decreed a reconveyance, would the justice have been complete, without decreeing satisfaction for so much of the inheritance as was carried off, by exhausting the mines? Clearly not. It would be a necessary unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainder-man had neither *jus in re* nor *jus ad rem*, before he was in *rerum natura*; and no wrong can be done to a person non-existent. But these are colourable objections only: for, if equity ought to wait, and expect the vesting of the estate for his benefit, and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning, (which hath, upon the maturest consideration, convinced me, that the plaintiff ought to be relieved in this Court,) before I state the objections made on the part of the defendant; the rather, because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders, was not intended, nor has been suffered, to alter the legal rights of the tenants for life, and the first remainder-man of the inheritance vested, either in respect of the timber, or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new invented limitation, was to alter and abridge the legal rights, both of the tenant for life and the first remainder-man vested; to abridge the legal right of the former to defeat and destroy the contingent use of the inheritance, whilst it remains contingent and eventual; to abridge the legal right of the latter to destroy it, by accepting a surrender of the estate for life; all which are as much legal powers, as the cutting down of timber, or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life, or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested, shall have the benefit of it; so was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of Whitfield against Bewit, 2 P. Wms. 240: but the ascertaining of the ground of these resolutions, is sufficient to distinguish them from the present case. Tit. 3. c. 2. § 42.

The common law doth not, nor can consider contingent uses as having existence till they happen; therefore, according to Lewis Bowles's case, 11 Co. 79, and Udall against Udall, Alleyn 81, an estate in contingency is as no estate, till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and, on the foundation of that property, he may maintain trover for them.

This is his right at law; and there is, in the cases put of trees fallen by accident, or merely by the

wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of the collusion in this case. This destruction being made by contrivance and collusion with the remainder-man, and affecting his conscience, obliges this Court to pursue its known maxims, in laying hold of it, either by restraining the act before it be completed, or decreeing satisfaction for it afterwards. For in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.

Second objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person, who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions, even at common law. But if it were true at common law, in the latitude with which it was laid down, it would not govern this case, which depends upon principles of equity, arising from the collusion and covin between the tenant for years and the remote remainder-man; which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavour to show how far the opinion I have given, coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is tenant for life with remainder for life, remainder over in fee or tail, and tenant for life commits waste, the remainder-man in fee, or in tail, can have no action of waste. The

reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and if it should be recovered by the owner of the inheritance, (being under a limitation of the party,) it would never go back again.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainder-man for life dies, living the remainder-man of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be tenant for life, with an immediate remainder or reversion in fee, and the remainder-man, or reversioner in fee, grants over his remainder or reversion to A. for the life of A., then the tenant for life commits waste, and afterwards the grantor of the remainder or reversion for life dies, this remainder-man or reversioner in fee may maintain an action of waste, though he had parted with his remainder or reversion for that time by his own voluntary act.

All this appears by Paget's case, 5 Co. 76 *b.*, and the case of Udall v. Udall; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and therefore, though it be requisite, in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison, yet, if the estate were out of him by wrong, and then came into him again, he shall main-

tain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done, yet, as it was out of him by tort, when it is revested, he shall have this remedy. Co. Lit. 356 *a*.

But there is another case at law, the reason of which seems to me to be more analogous to the present case: as that of a bishop, after the restitution of temporalities to him and his successors in right of his church. When he dies, during the vacancy, the right is in the king; and when a new bishop is invested in the temporalities, the fee is in him. Suppose, then, a tenant for life or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done. Co. Lit. 356. Fitzherbert's N. Br. 112.

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the statute of Marlb. ch. 29. against depredations upon the possessions of ecclesiastical persons, gave this remedy; and, for this, some countenance may be drawn from what Fitzherbert says in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops, or their possessions; and of this opinion is Lord Coke, in his reading on the statute of Marlb. 2 Inst. 151. His words are: "This act extendeth only to abbots, priors, and other prelates that be religious and regular, and not to bishops and other ecclesiastical persons

being secular; for, in the second clause of this act, *hujusmodi religiosorum* is mentioned, for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore the church or religious house is holden always one, in respect whereof the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste for waste done in his predecessor's time; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons secular; because the church, by their death, hath an alteration, and is not always one."

That the opinion of Lord Coke was, that the action is not founded on the statute of Marlb. is clear by other cases; for if bishops were within the statute, then they, as well as abbots, might have an action of waste, for waste done, not in time of vacancy, but in their predecessor's time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled, that they cannot. 39 Edw. III. 15. 2 Henry IV. 2. 2 Roll's Abr. 8. 24 Pla. 3, 4, 5, 6, 7. From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law, which would not permit an estate which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed or stripped, without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet

that would not govern this case, which depends on principles of equity; and equity hath always gone further to restrain waste and destruction, than the common law hath done.

Therefore, in the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction; and this *ab antiquo*, according to the case in Moore, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Rich. 2., 1 Roll's Abr. 377. 1 Vern. 23. and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law dispunishable for waste, by reason of the inheritance, which was once in him, yet Lord Chancellor Nottingham was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber which grew for the ornament of a mansion-house, Abraham v. Bubb, 2 Vern. 53; and 2 Shower, 69. In the same book, there is the like case before Sir John Trevor, M. R., 2 Freeman, 278; and this hath been followed since by several cases of tenant for life without impeachment of waste generally, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter, or ornament of the mansion-house.

But this Court hath gone still further; and, in the case of Abraham v. Bubb, Lord Nottingham cites the case of a Lady Evelyn, where there was tenant for life, remainder to the first son for life, without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land, and felled timber, which was not under the description of trees growing for shelter or ornament; and this Court granted an injunction

against him, though no action whatsoever could be maintained at law: and, upon the same ground, I did the like in the case of Fleming against the late Bishop of Carlisle, and others. There the Bishop was tenant for life, remainder to his eldest son for life, without impeachment of waste, with remainder over in fee. The eldest son, by permission of the Bishop, entered, and began to cut down the timber; and the reversioner in fee brought a bill for an injunction; and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession. And this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

The case of Robinson against Lytton went still further than the common law: that cause was heard in this Court the 12th of December 1744; there was a devise to the defendant and his heirs, and if he should die before his age of 21 years, leaving no issue, then to the testator's first, &c. daughters in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of 21 years, then the estate should be sold, and the money to be applied for the benefit of the testator's daughters. The defendant, being under the age of 21 years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet, by reason of the contingent executory limitation, the Court granted an injunction; and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

3 Atk. 209. 2 Eq. Ca. Abr. 528.

Third objection.—That suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed, yet it will not follow from thence that after that is over, a bill may now be brought for an account; and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true, that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained, without praying an injunction.

3 Atk. 262. In support of this notion, only one case was cited, Jesus College against Bloome, which was before me November 13, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials off the premises, and converted them to his own use. The term was expired, and a new lease granted to a stranger. The college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste; and it stood over to another day, to produce precedents. None were produced; and the bill was dismissed without costs: but the point was not absolutely determined, nor was that the only ground of the dismission; but I was of opinion, that at the utmost it was in the discretion of the Court; and if the college had a right, they might clearly bring an action of trover at common law; and

it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired.

This is widely different from the present case, in all its circumstances, and particularly that it is admitted that the plaintiff here, though greatly damnified, can have no remedy at law, which is a substantial difference.

Fourth objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured, and laid out in land, for the benefit of the contingent remainder-man; and this could not be done, even upon a bill by trustees to preserve contingent remainders, before the waste completed; and for this the case of Whitfield against Bewick was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer, without repeating it. The sound distinction between this case and that of Whitfield and Bewick, is the collusion and covin between the tenant for years and the remote remainder-man in fee; whereas in that case, the remote remainder-man in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed; but it was solely the tortious act of the tenant for life; and I think I have proved, that in some cases of destruction of contingent remainders, or alienations of part of the inheritance to the prejudice of the contingent remainder-man, such an account and compensation must be decreed in order to obtain adequate justice.

On this I rely for an answer to that objection.

Fifth objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May 1724: his father lived till 1727, and he did not attain his age of 21 years till May 1745; and this bill was brought in May 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainder-man in fee, after the death of a mesne remainder-man for life, for waste done in his lifetime? That life may have lasted forty, fifty, or sixty years afterwards; and yet this the law allows. Besides, in this case, the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar; and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder which was in him by the will, and gained a new use. That this might have been a bar to a proper action of waste at law, for waste done precedent; and by parity of reason ought to take away his remedy in this Court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Lit. 53 *b.* Lord Coke lays it down, that after waste done, there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done; for if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A. grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable, and so of the like; because the estate of the reversion continueth not, but is altered; and consequently the action of waste for waste done before, which consists in privity, is gone.

This is undoubtedly law: but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, which in Lord Derwentwater's case, before the Judges and Delegates, Hil. 6 Geo. I. was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the statute *De Donis*; and this was agreeable to the resolution of the case of Abbot against Burton, 2 Salk. 590. Trin. 7 Ann. C. B.; and to the case of Martin ex dem. Tregonwell against Strahan, adjudged in B. R. Hil. 16 Geo. II. and affirmed in the House of Lords in February 1748. 11 Mod. 181. Com. Rep. 160.

But I go further still, and hold, that even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property in the timber severed before would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection, as applied to the present case.

Seventh objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: That an action of waste dies with the person; and if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death. That the law is the same as to the action of trover: *pari ratione*, he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime. Though as to this point I give no opinion: for thus much is certain, that an action of trover will lie for an executor upon a conversion by the defendant, in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the action of trover for the timber was, as well as the strict action of waste would have been, gone at the common law; but notwithstanding that, I am of opinion, that the plaintiff is entitled to the same relief in this Court.

There have been several determinations in this Court, where, by force of the rule *actio personalis moritur cum personâ*, the remedy at law hath been extinguished, yet equity hath given the like satisfaction.

It is well known that at common law, before the statute of 30 Car. II. c. 7, and 4 & 5 Wm. and Mary, c. 24. § 12., no action or remedy could be had against the executor of an executor for a *devastavit* committed by the first executor of the goods of the original testator. But notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor, out of his assets.

This is laid down as a rule in equity by Lord Chancellor Nottingham, in the case of Price against Morgan, 2 Ch. Cas. fol. 215.

His words are: "Although, by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here; and the common law will come to it at last; and, therefore, whatever estate of the wasting executor is come to his representative, which his testator wasted, the personal estate of such wasting executor, in the hands of his executor, shall answer."

When Lord Nottingham said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. II., and the law was altered by act of parliament in the 30th of Car. II.

1 Ch. Cas. 121. Eton College against Beauchamp and Biggs.—The provost and fellows of Eton were possessed of a rent or pension of 1*l.* 14*s.* *per annum*, granted by King Hen. VI. to that college, issuing out of the lands. The defendant Biggs was executor of the tenant; and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college did not know

And. 1 Eq. Ca. Ab. 32.

the lands out of which the rents were issuable, and so could not distrain; and though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said that thereby the testatrix's personal estate was augmented; and therefore the Master of the Rolls, Sir Harbottle Grimstone, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293. Anon. error, Hil. 29 Car. II. in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices:— The case was, the plaintiff had declared against the defendant, as executor of Edward Nichols, who was executor of the debtor. The defendant pleaded that the said debtor died intestate, and administration of his goods was granted to a stranger, *absque hoc*, that Edward Nichols was ever executor, but did not say by his plea, or ever administered as executor, for, in truth, he was executor *de son sort*. The plaintiff replied, that before the administration granted to the stranger, Edward Nichols possessed himself of divers goods of the debtor, and made the defendant executor, and died. And to this replication the defendant demurred. Judgement was given for the plaintiff in the Court of Exchequer, but reversed in the Exchequer Chamber; for an executor of an executor *de son tort* is not liable at law, though the Lord Chancellor Nottingham said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon: but I go further, and hold, that in all cases of fraud, the remedy doth not

lie with the person; but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For as equity disclaims the maxim, that a personal remedy dies with the person; wherever the demand is proper for that jurisdiction, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction. Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud; and you have observed that one principal ground of the judgment of the Court in this case is, collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves: I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remainder-men springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that follow on the other hand, from laying it down that a contingent remainder-man cannot possibly have any remedy in such a case; I say, let them be compared, and the former will weigh nothing in the opposite scale against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities, and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements; and it frequently happens, that the first remainder-man of the inheritance vested is a remote relation; remote in blood, and remote in the prospect of succession, perhaps after fifty years contingent limitation of that inheritance.

If what has been done in this case should be determined to have been done *impune*, without any possible recompence in a court of equity, what havock would it make, and what a licence would be proclaimed! Every remainder-man in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life or years in possession, or perhaps of his under-tenant, strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of England, in the North, or in Cornwall, where the principal value may consist in timber, or mines, all that value may be exhausted and dissipated before a first son is born: he may find nothing but the shell of what was intended for the lasting support of a family of honour.

It will be no answer to this to say, the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know it; nay, possibly before they can know whether they are trustees or not: for it most frequently happens, that trustees to preserve contingent uses are inserted in settlements and wills without their being made acquainted with it.

From hence it is evident, that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance from the practice and abuses of the times into which we are fallen; when so many new inventions and contrivances daily show themselves in courts of justice, to supply, or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the Judges in Fermor's case, 3 Co. 79.; and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the statute of the 4th of Hen. VII. c. 24.; but the book says, "Lastly, the Judges, in this resolution, did greatly respect the general mischief which would ensue, if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance." Tit. 35.

The result of the whole is,—I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of his assets; and if the original limitations had been still subsisting, I must have directed this money to have been laid out in lands, to the same uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this the question of interest is material, and I have considered it. The principal money is reckoned by the answer at 1,000*l.*; the cause being heard on bill and answer, and the plaintiff having at the bar prayed interest from the time it was received, in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber; whether by the time the plaintiff's father died in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests or accidents; or what young timber may have grown up in its place in the mean time. From these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

TITLE XVI.

REMAINDER.

CHAPTER VIII.

Of other Matters relating to Remainders.

1. *Where Contingent Remainders are limited, the Inheritance remains in the Grantor.*
12. *How far this Doctrine is applicable to Common Law Conveyances.*
14. *Contingent Remainders are transmissible.*
16. *And also Contingent Uses.*
18. *Exception.*
20. *A Contingent Remainder may pass by Estoppel.*
22. *May be assigned in Equity.*
23. *And devised by Will.*

Section 1.

Where Contingent Remainders are limited, the Inheritance remains in the Grantor.

WHERE a remainder of inheritance is limited in contingency, by way of use, the inheritance in the mean time, if not otherwise disposed of, remains in the settlor or grantor, until the contingency happens, to take it out of them.

6 Rep. 18 *a*.

2. Thus, in Sir E. Clere's case, it was resolved by Popham, Chief Justice, and Baron Clarke, upon conference had with the other Justices, that "if a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates, as he shall appoint by his will, that by operation of law, the use doth vest in the feoffor, and he is seised of a qualified fee; that is to say, till declaration and limitation be made according to his power." And that "when a man makes a feoffment to the use of his last will, he has the use in the mean time."

Leonard Lovie's Case, 10 Rep. 78.

3. A feoffment was made to the use of the feoffor for his life, afterwards to the use of such tenants as he should demise any part of the premises to, for life or years, &c.; afterwards to the use of the performance of his will, and to the use of such person and persons to whom he should devise any estate in the premises; and after performance of his will, to the use of several persons successively in tail; and ultimately to the use of himself and his heirs for ever.

It was held, that nothing vested till the death of the feoffor, because he had power by his will to devise to any person even in fee simple; from which it followed, that, in the mean time, the use of the fee vested in the feoffor, as it was adjudged in Clere's case.

Carth. 262.

4. In the case of Davis v. Speed, Lord Holt put this case.—"If a feoffment in fee is made to the use of A. and the heirs of his body begotten, the remainder in fee to the right heirs of T. S. who is then living, in such case the fee simple is not in abeyance, nor in the feoffee; but the use of the fee shall result to the feoffor, and remain in him until the contingency, viz. the death of T. S., shall happen."

5. It is the same where a contingent remainder is created by a devise, as the inheritance will descend to the heir of the devisor.

ante, c. 6. § 23.

6. Thus, in the case of Plunkett v. Holmes, it was said by Wyndham and Twisden, and agreed by the other Judges, that the fee descended to T. as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance. That in relation to L., T. took only an estate for life, but in the mean time, by operation of law, he had the fee in such sort, as that there should be an *hiatus*, to let in the contingency when it happened.

7. S. Shelton devised to his wife for life, if she had a son, and caused it to be called by his christian name and sirname; then he gave the inheritance of his lands to him, and if he died under 21, then to his own heirs. After the death of the devisor, his widow married again, and procured a conveyance of the inheritance from the heir at law to her husband and herself, and levied a fine to them. Purefoy v. Rogers, 2 Saund. 380.

Saunders urged, that the contingent remainder to the son was not destroyed; for that, at the time of the fine, the heir of the testator had no reversion or estate in him; because an estate for life was devised to the wife, and the remainder in fee was devised to her son, upon a contingency; so that, until it could be known whether such contingency would happen or not, the reversion must be in abeyance, not in the heir; and then his conveyance gave no estate to the husband and wife, but they were only tenants for the life of the wife, as before.

Lord Hale interrupted him, and said it was clear the reversion was in the heir of the testator by descent, not in abeyance. Accordingly it was adjudged, that the contingent remainder was destroyed.

8. In the case of Carter v. Barnadiston, which has been already stated under another name, a question arose whether the fee was in abeyance, or descended to the testator's heir at law. Loddington v. Kyme, ante, c. 1. § 55.

Sir J. Jekyll considered the fee as in abeyance. He strongly argued against the notion of the fee's descending (in that case at least) to the heir at law of the testator, till the contingency happened; yet admitted, that where one devises lands to A. for life, remainder to the right heirs of J. S., then living, though the remainder in fee is in abeyance, yet there is a possibility left in the heir. That this was plain 1 P. Wms. 511.

even in the case of a grant, and that this possibility seemed such an interest, as entitled the donor to enter for the forfeiture made by tenant for life; for his estate was as much determined as it would have been by his death; and it was absurd, that a tenant for life, by an unlawful act, viz. by his destroying the contingent remainder, should gain to himself an indefeasible fee simple. It was like the possibility that was upon a grant at common law, to a man and the heirs of his body; for there, though the grantor had no reversion, yet he might enter when the grantee died without issue.

Upon an appeal to Lord Parker, this decree was reversed. Mr. Peere Williams thus reports the Chancellor's argument.

"As to the remainder in fee being in abeyance, or in the custody of the law, or (as some call it) *in gremio legis*, his Lordship much exposed that notion, saying, the most reasonable inference from it was, that it should be for the preservation of this remainder; but since the construing the fee to be in abeyance would, on the contrary, tend to the manifest destruction thereof, and since nothing but necessity in any case should occasion the fee simple to be in abeyance; since the diversity taken by the books was between a will and a common law conveyance, and that in case of a will, where the remainder was devised in contingency, it was held, that the reversion in fee descended to the heir at law in the mean time, and that whatsoever estate was not disposed of by the testator, descended to the heir; his Lordship said he should abide by that opinion, and was very clear in it.

"That it was a strange construction to take pains, by a strain in law, to place a remainder in law in

nubibus, or in abeyance, on purpose that the testator's intention should be wholly frustrated, and that the tenant for life should be under a temptation to disappoint the will, by destroying the contingent remainder, by a recovery or feoffment; which in this case must be tortious conveyances: nay, what was still more extraordinary, that the tenant for life must be rewarded for this wrong; and that he, who before had but an estate for life, should gain an absolute and indefeasible fee simple; and this by doing a wrongful act, which would be to take advantage of his own wrong, both against law and reason.

"That the case of Plunkett v. Holmes was a resolution in point, that where the remainder in fee was devised in contingency, the fee descended to the heir until the contingency happened. And though he should admit that resolution to be extrajudicial, and not directly to the point then in question; yet the opinion of four learned Judges must be of great weight, especially against the notion which was contended for by the other side. And that the case of Purefoy v. Rogers, in 2 Saunders, was equally in point: and the interruption which Lord Hale gave to Saunders, who attempted to argue this, did not proceed from any heat or impatience in Lord Hale, who was master of a great deal of temper as well as learning; but from the result of his fixed judgement and opinion, that where after an estate for life, the remainder in fee was devised upon a contingency, the fee simple not being disposed of until the contingency happened, must in the mean time descend to the heir. And to say that in these cases of Plunkett v. Holmes, and Purefoy v. Rogers, the devise over of the fee, after the contingent devise in fee, was to the testator's right heirs; and that this distinguished it

ante, c. 6. § 23.

ante. c. 6. § 22.

from the principal case, and made the heir take by descent, was hardly agreeable to the rules of law; for when the testator had devised the remainder in fee upon so remote a contingency, having in that manner given a fee, he could go no farther, nor devise any remainder over; and therefore, in such case, the devise over of the fee simple would be void, whether made to the heir, or to any other person.

"That these devises to the issue male of Evers Armyn in fee, if there should be any issue male, or if there should be none, then that Willoughby should go to Barnadiston in fee, and Pickworth to Styles in fee, being made upon contingencies that never happened, it was the same thing as if those devises had never been made; and consequently the reversion in fee descended to the testator's heir at law."

9. Notwithstanding the authority of the preceding cases, the doctrine of the fee simple being in abeyance was held by Lord Talbot in the following case.

Vick v. Edwards, 3 P. Wms. 372.

10. A. devised lands to B. and C., and the survivor of them, and the heirs of such survivor, in trust to sell: the estate was decreed to be sold; and it being referred to the Master to see whether the parties could make a good title, he reported that they could not make a good title, there being no fee simple in the trustees, for that the remainder in fee could only be vested in the survivor; and it was uncertain which of the two trustees would be the survivor.

Exceptions being taken to the Master's report, Lord Talbot held, that the trustees joining in a fine of the premises, would pass a good title to the purchaser by estoppel: that here the fee was in abeyance. And it being said by the counsel that the heir of the devisor would join in the conveyance to the

purchaser, he replied, that the heir's joining would supply the want of proving the will, but that in every other respect it would be void.

11. Mr. Fearne has observed, that the opinion in this case does not appear to have been the subject of sufficient consideration to be relied on as an authority against the doctrine relative to the descent of the inheritance to the testator's heir; which appears to have been so directly and fully established by the several cases above stated, that to dispute the descent of the inheritance to the heir at law of the testator, in the case of a contingent remainder created by will, would be sacrificing the authority of a series of cases wherein that point had been solemnly decided, and repeatedly recognized, after the maturest discussion, to the occasional opinion of Lord Talbot, in Vick v. Edwards, where that point was not debated, nor the direct subject of decision.

Cont. Rem. 525.

Exparte Harrison, 3 Anstr. 836.

12. The preceding observations on the doctrine of the continuance of the inheritance in the grantor and his heirs, or in the heirs of the devisor, is confined to cases of conveyances by way of use, and dispositions by will; for different opinions have prevailed in respect to its admission in conveyances at common law.

How far this Doctrine is applicable to Common Law Conveyances.

Some have held, that in case of a lease for life, remainder to the right heirs of J. S., then living, no estate at all remains in the grantor; and that he cannot enter for the forfeiture in case of a feoffment by the tenant for life: whilst others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for the forfeiture, upon a feoffment by the tenant for life; no less than on the determination of his estate by death, before the contingency happens. These opinions are founded on an assumption that the remainder must

1 Inst. 342 *b*. 1 P. Wms. 515.

pass out of the donor at the time of the livery, consequently that no estate shall remain in him after such livery; therefore, in the case of a lease to one for life, remainder to the right heirs of J. S., the remainder is in abeyance, or *in nubibus*, or *in gremio legis*. Though, says Mr. Fearne, by way of some sort of compromise between common sense, and the supposition of an estate passing out of a man, when there is no person *in rerum natura*, no object besides hard and hardly intelligible words for the reception of it, at the time of the livery; they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate, before the contingent remainder can take place, entitles the grantor or his heirs to enter, and re-assume the estate.

Vin. Ab. Tit. Rem. (I.)

13. In 2 Roll's Abridgement, 418, it is laid down, that if a lease for life or in tail be, the remainder to the right heirs of J. S., and tenant for life dies without issue, living J. S., the remainder is void, because J. S. cannot have an heir during his life: and inasmuch as this does not take effect during the particular estate, it shall never take effect, though he dies after, and has an heir: in such case, inasmuch as the remainder cannot take effect, the donor shall have the land again. What is this in effect, says Mr. Fearne, but admitting that no more actually passed out of the grantor than the estate to the tenant for life, or in tail; until and unless J. S. died before the estate of such tenant determined.

Cont. Rem. 528.

Contingent Remainders are transmissible.

14. A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens.

Weale v. Lower, Pollex. 54.

15. Richard Lower made a feoffment to the use of himself for life; after the death of himself and P.

his wife, to the use of Thomas his eldest son for life; after the death of Richard, and P. his wife, and Thomas, to the use of Jane the wife of Thomas, and of such issue male or female as the said Thomas should beget on her; if Thomas should have no issue by her, then to the use of Jane for life; and after the death of Richard, and P. his wife, and Jane, all the lands to the use of Thomas and the heirs male of his body; remainder to the right heirs of Thomas.

Thomas had issue a daughter, then made a lease of all the lands by deed, indented for 500 years; afterwards granted the lands by fine to the lessee for 500 years, and died in the lifetime of Richard.

It was held, that the estate limited to Thomas was a contingent remainder, for the particular estate was only for the life of Richard, whereas Thomas's estate was not to commence till after the death of Richard and P. his wife; and though Thomas levied the fine for 500 years, and died before the contingency happened, yet his heir afterwards, when the contingency did happen, was bound by the fine, and the lease for 500 years took place; for it was agreed that the contingent remainder descended to his heir.

16. The same law holds with respect to contingent uses, which will also descend to the heir. **And also Contingent Uses.**

17. Thus it is laid down in Shelley's case, that if a man seised of the manor of S. covenants with another that when J. S. shall enfeoff him of the manor of D., then he will stand seised of the manor of S. to the use of the covenantee and his heirs: the covenantee dies, his heir within age: J. S. enfeoffs the covenantor. Held, that the heir should be adjudged in, in course and nature of a descent: and yet it was neither a right, title, use, nor action, that descended, but only a possibility of an use, which could neither **Wood's Case, 1 Rep. 99 *a*.**

Wilson v. Bayley, 3 Bro. Parl. Ca. 195.

be released nor discharged: but it might, if the condition had been performed, have vested in the ancestor; and then the heir had claimed it by descent.

Exception. Cont. Rem. 534.

18. Mr. Fearne has observed, that some cases may arise where the existence of the devisee of a contingent remainder, at some particular time, may, by implication, enter and make part of the contingency itself, upon which such interest is intended to take effect; in which case it cannot descend.

Moorhouse v. Wainhouse, 1 Black. Rep. 638.

19. Thus, in a modern case, where a husband and wife settled certain lands, which were the inheritance of the wife, to the use of the wife for life, remainder to the husband for life, if he and his wife should have any issue that should so long live, remainder to all such children in fee, as tenants in common; if the wife should die without issue, or all such issue should die before twenty-one, then, as to one moiety, to the husband in fee. The husband died in the lifetime of his wife.

The Court was clearly of opinion, that upon all the circumstances of the case, the contingency upon which it was intended that the estate of the husband should arise, was that of his surviving his wife; and that as he died first, the contingency never arose.

A Contingent Remainder may pass by Estoppel.

20. A contingent remainder may, before it vests, be passed by fine, by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency.

ante, § 15.

21. Thus, in the case of Weale v. Lower, it was determined, that though the fine operated at first by conclusion, and passed no interest, yet the estoppel should bind the heir: that upon the happening of the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied: and

that if the fine had been in fee, it would have barred the heir, and operated to the benefit of the possession, as the fine of a disseisee to a stranger; but being only for years, the fee was vested, and the term good, being drawn out of the fee. Vick v. Edwards, Tit. 35. c. 12.

22. Although a contingent remainder cannot be passed or transferred by a conveyance at law, before the contingency happens, otherwise than by estoppel, by deed or fine, or by a common recovery, wherein the person entitled to the contingent estate comes in as vouchee; yet it seems that contingent estates are assignable in equity. May be assigned in Equity. Fearne, Cont. Rem. 537. Tit. 38. c. 20.

23. Contingent remainders were formerly held not to be devisable by the persons entitled thereto, whilst they remained in contingency; but it has been determined, in some modern cases, that where contingent remainders are descendible to the heirs of the persons entitled to them, they may be devised by will, like any other estates, of which an account will be given hereafter. And devised by Will. Tit. 38. c. 3.

TITLE XVII.

REVERSION.

1. *Description of.*
12. *A Reversion arises from the Construction of Law.*
14. *Reversions are vested Interests.*
17. *But may be devested.*
19. *Incidents to Reversions.*
22. *Reversions after Estates for Years are present Assets.*
24. *After Estates for Life are quasi Assets.*
27. *After Estates Tail are Assets when they come into Possession.*
36. *And bound by Judgements, &c.*
38. *And also by Leases.*
41. *All particular Estates merge in the Reversion.*

SECTION 1.

Description of. 1 Inst. 142 *b.*

THE second kind of estate in expectancy is called a reversion; which is defined by Lord Coke to be the returning of the land to the grantor or his heirs, after the grant is determined. *Reversio terræ est tamquam terra revertens in possessione donatori, sive hæredibus suis, post donum finitum.* In another place Lord Coke describes a reversion to be, where the residue of the estate always continues in him who made the particular estate.

Id. 22 *b.* Plowd. 151.

2. The idea of a reversion is founded on the principle, that where a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him, and the possession of it reverts or returns to him, upon the determination of the preceding estate. Hence Lord Coke says,—"and the law termeth a reversion to be expectant on the particular estate, because the donor or lessor, or their heirs, after every

1 Inst. 183 *b.*

etermination of any particular estate, doth expect r look for, to enjoy the lands or tenements again."

3. If therefore a person who is seised in fee conveys is estate to A. for life, remainder to B. for life, emainder to twenty other persons for life, he still etains the fee simple, because he has not parted with it. But as such fee simple can only return or all into possession upon the determination of the preceding estates, it is only an estate in reversion.

4. Before the statute *De Donis conditionalibus*, no reversion remained in the donor, after he had created a conditional fee; because the grantee of such an estate was considered as having the absolute property of it, and the donor had only a possibility of reverter, not an actual estate in reversion. But as soon as the statute *De Donis* was made, the Judges held that an estate given to a man and the heirs of his body, was only a particular estate, therefore there remained an estate in reversion in the donor. Tit. 2. c. 1. Plowd. 248 Lit. § 18, 19.

5. Lord Coke has observed, that this point was once doubted, but without reason, for at the same session of parliament in which the statute *De Donis* was made, ch. 3. it is expressly said, *vel per donum in quo reservatur reversio.* So that, by the judgement of the same parliament, a reversion was settled in the donor. 1 Inst. 22 *b.*

6. Where a gift is made of a qualified or base fee, no reversion remains in the donor. For Lord Coke says;—If lands be given to A. and his heirs, so long as B. hath heirs of his body, remainder over in fee, the remainder is void. 1 Inst. 18 *a.* Tit. 1. § 81.

7. Lord Chief Justice Vaughan observing upon this passage, doubts whether it be law; and says, —"When such a base fee determines for want of issue of the body of B. the land returns to the grantor Vaugh. R. 269.

and his heirs, as a kind of reversion; and if there can be a reversion of such an estate, I know not why a remainder may not be granted of it."

1 Inst. 46 *b.* Tit. 8. c. 1. § 14.

8. Where a person creates an estate for years by lease, he has a reversion as soon as the lessee enters, and not before. But when an estate for years is created by a conveyance deriving its effect from the statute of uses, the person to whom such estate is limited acquires the actual possession without entry; consequently the person who creates the estate for years has a reversion immediately upon the execution of the conveyance.

Tit. 11. c. 4. § 12.

9. Where a person, having only a particular estate in lands, grants a smaller estate than his own, he has a reversion left in himself. Thus, if tenant in tail grants an estate for the life of another, he has a reversion in him; because he has not parted with his whole interest.

10. In the same manner where a person who has an estate for 99 years, grants it for 98 years or for any shorter term, he has a reversion left in him: if he even grants it for 99 years, less one day, he has a reversion.

1 Inst. 22 *b.*

11. Lord Coke says, if a man extends lands by force of a statute merchant, statute staple, recognizance, or *elegit*, he leaves a reversion in the cognizor.

A Reversion arises from the Construction of Law. 1 Inst. 22 *b.*

12. A reversion is never created by deed or writing, but arises from construction of law. Thus Lord Coke says, if a man makes a gift in tail, or a lease for life, the remainder to his own right heirs, the remainder is void, and he has the reversion in him. So if a man makes a feoffment in fee, to the use of himself for life, and after to the use of another in tail, and after to the use of his own right heirs; the reversion in fee is in him, because the use of the fee

Tit. 11. c. 4. § 34.

continued ever in him: and the statute of uses executes the possession to the use, in the same plight as the use was limited.

13. Lord Coke also says, if a man makes a feoffment in fee, to the use of himself in tail, and after to the use of the feoffee in fee, the feoffee has no reversion, but in the nature of a remainder; albeit the feoffor have the estate tail executed in him by the statute of uses, and the feoffee is in by the common law: which, he says, is worthy of observation. 1 Inst. 22 b.

14. Although a person can only be said to be entitled to, not seised of, a reversion; yet estates in reversion are properly classed under the general denomination of vested interests: because a person entitled to an estate in reversion has an immediate fixed right of future enjoyment; that is, an estate vested *in præsenti*, though it is only to take effect in possession and profit *in futuro*; and which may be aliened and charged much in the same manner as an estate in possession. Reversions are vested Interests. 2 Rep. 61 a.

15. The law is as careful of the rights of the reversioner, as of those of the tenant in possession; and will therefore allow an action to be brought by the reversioner, as well as by the tenant in possession, for an injury done to the inheritance.

16. A person in reversion brought an action, for erecting a wall, whereby his lights were obstructed; and obtained a verdict, with general damages. On a motion in arrest of judgement, it was objected, that this action would not lie by a reversioner, being only an injury to the person in possession. Jeffer v. Gifford, 4 Burr. 2141.

The Court was of opinion that an action might be brought by one, in respect of his possession, and by

the other, in respect of his inheritance, for the injury done to the value of it; for if the reversioner wanted to sell the reversion, this obstruction would certainly lessen the value of it.

But may be devested.

17. An estate in reversion expectant on an estate for life may be devested by the feoffment or fine of the tenant for life; by which nothing but a right of entry will remain in the reversioner. But where the particular estate is only for years, a fine levied by the termor will not have that effect.

Goodright v. Forrester, Tit. 35. c. 12. Hard. 401.

Tit. 2. c. 2. § 6.

18. It has been stated that a feoffment or fine by a tenant in tail will discontinue the reversion; by which the reversioner will be deprived of his right of entry, and driven to his real action.

Incidents to a Reversion.

19. The usual incidents to an estate in reversion are said to be fealty and rent. Where no rent is reserved out of the particular estate, fealty results of course, and may be demanded as a badge of tenure.

1 Inst. 143 *a*. 151 *b*.

20. Lord Coke says, that in the case of a gift in tail, lease for life, or years, fealty is an incident inseparably annexed to the reversion; so that the donor or lessor cannot grant the reversion over, and save to himself the fealty, or such like service: but the rent he may except, because the rent, though it be incident to the reversion, yet is not inseparably incident.

Tit. 5. c. 2. Tit. 6. c. 3.

It has been stated that curtesy and dower are incident to reversions expectant on estates for years, but not to reversions expectant on estates of freehold.

Reversions after Estates for Years are present Assets.

21. A reversion expectant on the determination of a term of years, is present assets, for payment of debts. For the heir cannot plead a term of this kind, created by his ancestor, in delay of execution, but must confess assets.

22. In an action of debt against the heir, upon the obligation of his ancestor, the defendant, not denying the action or obligation, pleaded that his ancestor was seised in fee, and that he demised the same for 500 years to A., who entered; and that the said reversion descended, *et riens ultra;* and that, at the time of the action brought, he had no tenements in fee simple by descent, except the said reversion. It was not questioned, but judgement ought to be given for the plaintiff; the doubt was, whether general or special.

Smith v. Angel, 1 Salk. 354. 2 Ld. Raym. 783. 7 Mod. 40. Osbaldston v. Stanhope, 2 Mod. 50.

The Court was of opinion, that a general judgement ought to be given. And Lord Holt said, it had been a doubt, whether the heir could plead a term for years in delay of present execution; and, though there were even some precedents to that purpose, yet he was of opinion, the heir could not plead a term in delay, but ought to confess assets: for the reversion is assets, and the common law had no regard to a term for years, 2 Inst. 321. And there is no mischief in this: for though, in consequence, a *levari facias* may go, yet the lessee may maintain himself against an ejectment, by virtue of his lease.

23. In a subsequent case, the Court of Common Pleas acquiesced in the doctrine laid down by Lord Holt, but gave judgement upon another point.

Villiers v. Handley, 2 Wils. R. 49.

24. A reversion expectant on the determination of an estate for life, is *quasi* assets, and ought to be pleaded specially by the heir; but, in such case, the plaintiff may take judgement of it *quando acciderit.*

After Estates for Life are quasi Assets.

25. In debt against the niece, as cousin and heir to the uncle, the obligor, the defendant confessed the bond by *nient dedire,* but that nothing in fee simple descended to her beside a reversion of 30 acres of marsh in S., &c. after the death of such a one. It

Dyer, 373 *b.* pl. 14.

was held, that the plaintiff might pray a special judgement upon the confession; viz. that he should recover the debt and damages of the aforesaid reversion, to be levied when it should fall in; and a special writ should issue to extend the whole 30 acres.

Rook v. Clealand, 1 Ld. Raym. 53. Lutw. 503.

26. A man, seised of a reversion expectant upon an estate for life, bound himself and his heirs in a bond, and died, living the tenant for life: it was held, that this reversion should be assets in the hands of the heir, whenever it came into possession.

After Estates Tail are Assets when they come into Possession.

1 Roll. Ab. 269.

Tit. 2. c. 2.

27. A reversion, expectant on the determination of an estate tail, is said not to be assets during the continuance of the estate tail. But this is only because, during that time, it is considered to be of no value; as it is in the power of the tenant in tail to bar and destroy it whenever he pleases, by suffering a common recovery. But whenever reversions of this kind fall into possession, they then become assets.

Kellow v. Rowden, 3 Mod. 253.

28. In a special verdict, it was found, that John Rowden, the father of Richard (the defendant), was seised in fee of a messuage, &c.; and, being so seised, had issue John Rowden, his eldest son, and the defendant: that John the elder settled the premises on himself for life, remainder to John his eldest son in tail male, remainder to his own right heirs. After the death of the father, John his eldest son entered, and was seised in tail, and also entitled to the reversion in fee, and died leaving an only son, who soon after died without issue; whereupon the lands descended to the defendant as heir to his nephew, who entered, and was seised in fee. The question was, whether he was liable to the payment of a bond debt of his father's. The counsel on both sides agreed that the reversion, having come into possession by the determination of the estate tail, was chargeable with

e debt; and the only doubt was, whether the plain-
f ought to have named the intermediate heirs to the
version. Three of the Judges observed, that the
uestion was not, whether the defendant was liable
the debt, but whether he was properly charged as
ir to his father, or whether he should have been
harged as heir to his nephew, who was last seised.
nd it must be admitted, that if the lands had de-
cended to the brother and nephew of the defendant
a fee, then they ought to have been named; but
hey had only a reversion in fee, expectant upon an
state tail, which was uncertain, and therefore of
ittle value. But here the reversion in fee was come
nto possession, and the defendant had the land as
eir to his father: it was assets only in him, and was
ot so either in his brother or nephew, who were
either of them chargeable; because a reversion, ex-
pectant upon an estate tail, was not assets.

29. A reversion expectant on an estate tail, when it comes into possession, is assets for payment of debts, though it should be devised away; for by the statute 3 Wm. & Mary, c. 14. such a devise is rendered fraudulent and void against creditors. Tit. 1. § 58.

30. A settlement was made in 1707 of lands, to the use of Thomas Delahaye for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son of Thomas Delahaye in tail male, reversion to his own right heirs. Thomas being indebted by bond to several persons, and, among others, to one Blacket, gave him a collateral security of some stock, which was transferred for that purpose, and agreed to be re-transferred upon payment of principal and interest; and, being likewise indebted by simple contract, died in 1724, leaving issue one son, Thomas. In 1725, there was a decree Kynaston v. Clarke, MS. Rep. 2 Atk. 204.

obtained, by which the father's estate was directed to be sold for the payment of his debts, and the simple contract creditors to stand in the place of the bond creditors; and, under this decree, some fee-simple lands were sold and applied. In 1738, Thomas the son devised the settled estate to the defendant, and died without issue; whereby the estate tail was spent, and the reversion in fee came into possession.

The plaintiffs brought their bill to have this estate applied towards satisfaction of their debts, notwithstanding the devise of it by the son. And now the question was, whether this reversion in fee was to be considered as real assets of the father, applicable to the payment of his debts; or if it was prevented from being so, by the devise of the son?

Mr. Attorney General argued for the plaintiffs, that, if there had been no devise by the son, the reversion had certainly been assets: for, though it could not, during the continuance of the estate tail, be extended or sold for payment of debts, yet, when it descended, it was assets, and the heir is named in the obligation, which is all the law requires to subject it to the payment of bonds, as appears from Kellow v. Rowden, 3 Mod. 253. And, from Osbaldston v. Stanhope, 2 Mod. 50. it is plain, that the only thing which distinguishes such an estate from any other, is, that it is not immediately chargeable to satisfy debts; but that, where it descends and comes to the heir by succession, it clearly may. I shall, therefore, consider this case under these three heads: 1st, Upon the construction of 3 and 4 William and Mary, c. 14. against fraudulent devises, which gives an action against the heir and devisee; 2dly, That bonds are such liens in equity, either before or since that statute, as cannot by any contrivance be defeated; and,

ante, § 28.

3dly, That the decree in 1725 has bound this estate in equity, precedent to the devise, in such a manner, that no subsequent act can affect the estate.

1st, With respect to the act against fraudulent devises, both the reason and the words of it extend to the present case. The preamble is, "Whereas it is not reasonable or just, that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and, nevertheless, it has often happened, that where several persons, having by bonds or other specialties bound themselves and their heirs, have afterwards died seised in fee-simple of and in manors, &c. and have devised the same, or disposed thereof in such manner, as such creditors have lost their said debts; all wills, therefore, or testaments, of or concerning any manors, &c. whereof any person at the time of his decease is seised in fee-simple in possession, reversion, or remainder, &c. shall be deemed and taken (only as against such creditor or creditors as aforesaid) to be fraudulent and void." And, sect. 5, "in all cases, where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, &c. descending to him, and shall sell, alien, or make over the same before any action brought, such heir at law shall be answerable for such debt, &c. in an action of debt to the value of the lands," &c.

The mischief which this statute had in view, was a defect in the common law; that, although it was the intent of the law that an heir, in respect of the land descended, should be bound, yet it was left in the power of the obligor, by a devise, absolutely to defeat his creditors. This was the general mischief, and is plainly within the reason of the act, and the thing it intended to prevent: for, it is as unjust that

the heir should be able to defeat the creditor, as that the ancestor should, and, consequently, as much justice to prevent it in him, as in the other. The statute says, *all wills shall be void as against the creditor;* cautiously wording it, so as to take in every case where a creditor may be defeated of his debt, and where he would have obtained satisfaction, had no such will been made. It may be objected, that the will mentioned in the statute, is not the will of the heir, but of the ancestor. I answer, the act relates to all wills, and is not confined to that of the debtor; but, if it was, the heir is debtor in a proper sense for this purpose. The making of all wills void, as against creditors, is attended with no inconvenience: it gives the creditor no new right, but only removes that out of his way which unjustly obstructed him. It avoids the will only as to the creditor; and certainly, where the will of the heir prevents the creditor from that, which would otherwise, in point of law, have been applied for his satisfaction, such will is in fraud of the creditor. It may be said, that the preamble extends only to the will of the obligor, and that the enacting clauses must be restrained by the preamble; but the rule made to maintain the objection is not true; for it is well known, that general statutes are made from particular cases: every day's experience proves it; and, indeed, it is manifestly so in this act itself. For the preamble mentions only wills; but one of the clauses in the statute relates to conveyances made by the heir, which is less reconcileable to the preamble than wills made by him: and, though it be said, *for remedy of which,* it is added *and for the maintenance of just and upright dealing;* which is as much as to say, *and of all other the like cases;* and, to avoid all doubts of this kind,

the words *such creditors* are repeated, to show the provision was not to be restrained to one case only. Can it be conceived, that an act to prevent fraudulent devises should particularly provide against conveyances by the heir, and forget a devise made by him? But the legislature know, that the first part of the act gave remedy against that, as it did against all wills. Here I may observe, 13 Eliz. c. 5. against fraudulent conveyances; since it is a maxim, that statutes, made *in pari materiâ*, are to be taken into the construction of each other, as Lord Hale said in Baily v. Murin, 1 Vent. 246. such acts are explanatory of each other; and, agreeable to this, was the case of Hodson v. Wallis, considered upon the division of intestates estates. So, in Read v. Ward, 12th December 1789, where the question was, whether Knox Ward was a purchaser saved by the act against bankrupts, 21 Jac. I. c. 19, it was objected, that though there were five years between the act of bankruptcy and the commission, yet he had notice of the act of bankruptcy; and though 21 Jac. makes no mention of notice, yet it was thought proper to consider that act by the other of 13 Eliz. c. 7, by the last clause whereof it is enacted, that the act shall not extend to lands heretofore assured by any such bankrupt, or hereafter to be assured; so that such assurance be made *bonâ fide*, and that the parties, to whose use such assurance hath or shall be made, be not, at or before the making of such assurance, privy or consenting to the fraudulent purpose. Now, the 13 Eliz. makes all deeds void, which operate to the prejudice of creditors, whether made by the immediate debtor or not, according to Apharry v. Bodingham, Cro. Eliz. 350. where a conveyance, made by the heir of the obligor, was held fraudulent against a creditor.

Tit. 32. c. 27.

Idem.

So, in 5 Co. 60. the same question upon 13 Eliz. and the conveyance by the heir held fraudulent; and that acts of parliament made in prevention of fraud, ought to have a favourable interpretation. These cases went upon the doctrine, that the statute relates to all conveyances, which defraud the creditor of that estate that must otherwise have come to him by law, and prove that the act comprehends the alienation of the heir. It is objected, that the statute is confined to the debtor; but here it is a general question, whether the act against fraudulent devises extend to the devise of the heir: now the heir is debtor; he is bound in the bond; and, in an action against him, he may be charged without charging assets: it is his business to discharge himself for want of assets, for he is debtor with respect to the lands descended. The action must be in the *debet* and *detinet;* and, before the statute of jeofails, it was error to lay it in the *detinet* only. As, therefore, he is, in law, debtor, he is within the purview of the act; and, in Turner's case, 3 Co. 18., it is determined, that all statutes against fraud shall be liberally and beneficially expounded to suppress the fraud. If it is said, that this holds true, where the reversion is expectant upon an estate for life, but not where an estate tail intervenes, some pretence must be shown for this distinction. The act says, *reversions or remainders,* which, if relating to the first, must also take in the second, the second mischief being certainly the same in both.

2dly, The next question is, whether, supposing there was no remedy at law in this case, equity would suffer creditors to be defeated by the devise of the heir? It is a general rule, that a trustee cannot defeat a charge upon the estate by any voluntary act; but the charge will follow the estate in the hands of

the volunteer, and it makes no difference whether the conveyance be made in his lifetime by will, or dying without heir: for, if the taker is a volunteer, the estate will be charged. There is a plain instance of this, in the lien which the wife has, in this Court, upon any interest of her's not reduced into the husband's possession, to be provided out of it. *Sed per* Lord Chancellor, it is certain that, if an obligor, before the statute, devised his lands, equity could not come at them, nor relieve his creditors; that is settled. I have seen many cases of Lord Nottingham's, where it was so determined; and Lord Chief Baron Comyns said, he had heard Lord Chief Justice Holt declare, that equity could not aid in such a case. The wife, in the case I put, has such a lien, as will prevail even against a commission of bankruptcy; which is a strong and favourable consideration for creditors. I think it is since the statute, that equity has made the strong cases in favour of bond creditors, and considered the heir as strongly bound. The law gives the estate to the creditor only *quousque debitum solutum*; but this Court will decree a sale, order interest to be paid, and make the heir accountable for the profits received by him; because, since the statute, equity considers the heir as a trustee, and there is no other principle for such decrees. The law makes an heir pay costs in an action by a creditor upon a bond; but this Court gives him his costs, if he has done nothing wrong; and this upon the same principle. Equity will also direct the sale of a reversion after an estate for life; because the estate is applicable as a trust estate. I do not know that there is any instance of the Court's doing these things before the statute, but they have been done since by the equity of the act. In many cases, this Court goes farther than the law.

The law only gives an action against an executor for a *devastavit*; and, if the executor is insolvent, the creditor is defeated: but this Court goes farther. So, if a money legacy is paid, equity will oblige the legatee to refund. The law says, a reversion after an estate tail is assets, as much as after an estate for life; only, it is not so soon effectual. Where it is after a life, the heir cannot plead *riens per descent*, and the creditor will have a judgement against him; but, after an estate tail, he may plead *riens per descent*, yet the creditor may take judgement *quando acciderint*, and have execution when the reversion comes into possession. The only difference, therefore, is in regard to the time, when the creditor can obtain the fruit of his action; but that makes none in the things, nor in equity, which respects the substance, and not little variations in the form of pleading, or times of execution: in both, the bond is a real lien, though not immediately effectual against one interest. So, if a right incumbered, or a rent-seck descend, the heir may plead *riens per descent*, and the creditor may have judgement *quando acciderint*, and take execution after; yet the law says, that neither the right, before it be reduced into possession, nor the rent-seck before seisin had, are assets. Brediman's case, 6 Co. 58. Equity considers all contingent interests as real ones, though subject to a contingency, and will not let the person who has it carry it away. Suppose a contingent remainder, and, in the life of the obligor, the contingency not happened, it is not assets; but, when the contingency does happen, it will be applied to pay debts in equity: which shows that the Court considers bonds as real liens upon the estate, and will not, in any case, allow the creditor to be defrauded.

3dly, The third point is the decree of 18th June 1725, which has bound the estate. It directs the estate of the intestate father to be sold, and the money arising from the sale to be applied for payment of his debts. The Master, therefore, might have sold this estate under the decree; and, if he might, then the decree binds it from the time it was pronounced. Suppose a naked right, or a contingent remainder had descended, yet it would have been bound, though at law it is not assets; but it is bound to be applied *in futuro*. The meaning of *binding* by a decree is, an order that the thing shall be done: it is not material whether presently or at a future time. The only question, then, can be, whether a man shall defeat the intention of the Court; and it is evident from Sir Thomas Harvey v. Montague, 1 Vern. 57, 122. that the Court will not suffer it, nor countenance any art to elude the force of its decrees.

Mr. Murray argued for the defendant, that the construction of 3 & 4 W. and M. must be the same in this Court as at law; the intent of construing a statute being only to discover the meaning of parliament in making it; and that must be uniform and certain: for, if one Court puts a different construction upon it from the other, one of them must necessarily be in an error. Indeed one Court may give a different, more extensive, or more effectual remedy, than the other, as this Court generally does; but still the meaning of the Legislature must be the same in all Courts, where its acts are considered. I shall consider, first, how the matter in dispute stood, both at law and in equity, before the statute.

At that time, neither in law nor equity were lands devised liable to pay bond debts: there is no part of the law more certain, than what relates to

bonds, and the effects of them. If the heir was not named in the bond, it was only a personal contract: if he was named, all the effect of it was, that the lands descended to him should be liable; but still, in point of law, bonds were never considered as liens upon the obligor's lands; and therefore several other securities were introduced by acts of parliament, which should become real liens, as statutes merchant, staple, recognizances, &c. But bonds were left as they stood before, and no action upon them could be brought against a terre-tenant of the obligor, but against his heir. There were devisees before the statute of wills; but no action on a bond could be maintained against a devisee of lands by custom, merely because they were considered at law as alienees. The law was the same with respect to the devisees of the obligor, before 3 & 4 W. and M., and none of the statutes against fraudulent deeds relate to devises, either in law or equity; for the devise took not effect till death; and, from the time of Hen. VIII. to this statute, though many wills must have defeated creditors, yet there is no instance of their obtaining relief. This is proved by the greatest authority: for this very act of parliament says, that, by that means, the debts were lost. Since this act, all the cases have gone upon it as introducing a new law, as laying down a new rule; and the determinations have been founded upon it. 1 P. Wms. 99. A bill brought upon this act against the devisee of the obligor in a bond, the defendant insisted the heir should have been a party; saying, that the action shall be brought against the heir and the devisee jointly. Lord Cowper's words are: "It is the act makes this assets in the devisee's hands; and that, requiring the heir to be made a defendant, you must follow the remedy therein prescribed; and this

Tit. 14.

bill, in equity, is as an action at law:" which shows that these proceedings against devisees are considered in this Court as strictly founded upon the statute, which must be strictly pursued; and, independent of this law, equity could not interpose. Indeed, the reason of the thing speaks it: for this Court has only a concurrent jurisdiction with courts of law in legal assets to give relief; but, in the same rule of property; for to follow another rule, would be to make law. It is a maxim of law, that lands are not liable to simple contract debts, and copyholds to no debts. It may, perhaps, be hard to account for all these rules: they are founded upon reasons which have long since ceased; yet equity, finding those rules established, cannot assist against them. Before 29 Car. II. c. 3. an heir, taking a life estate as occupant, was not thereby subject to his ancestor's debts; nor did equity ever make him so: and, in all cases, where the law says that lands are legal assets, this Court does not depart from the rule of property laid down at law, but proceeds in a more extensive manner, and gives a more effectual remedy. Suppose the case of a reversion after an estate for life or in tail, the law says the first is assets, and that the heir cannot plead *riens per descent*; or, if he did, that judgement would be given against him: whereas, in this Court, the estate might be decreed to be sold, which is only coming at the thing sooner. But the other, in law, is not assets, because the heir may do what he will with it; he may sell or give it away; and the creditor's being able to take judgement, *quando acciderint*, proves nothing; for he may take such judgement, though there be nothing descended to the heir at all. This Court, then, will not say, such an interest is assets, because that would be to make law. Cases

may be put, where such a reversion is a good and certain estate, as where it is after a limitation to the first and other sons of a woman of sixty: yet it will not be assets. In order to avoid the confusion of two rules of property, this Court adopts the rule of law; so it does with respect to the civil law in cases of legacies; and, indeed, if different rules were allowed in different courts, it would be in the election of the party, what measure of justice, what sort of determination, he would take. The present will is made by one who is neither a debtor nor a trustee, for his estate was never liable: it was never assets in his hands; nay, it never was subject to pay debts in the hands of the obligor. How, then, can it be a fraud to dispose of what was never liable, even in the obligor's hands? There is no doubt but the heir might have incumbered this estate, given it to whom he pleased, barred it by a common recovery. *Cui bono,* then, is this Court to interpose? Only to put the parties hereafter to the expence of a recovery to enable them to devise it; and so, no fair or upright dealing will the statute produce, but with regard to the fees of C. B.

This brings it, therefore, to the construction of the act; and that must be uniform in law and equity. It sets out with a maxim, deduced from natural justice, that *creditors should not be defrauded*: are there any defrauded here? And, granting that this statute was made to supply a defect in 13 Eliz. and carry the provision to devisees; admitting, likewise, the rule of construction of acts *in pari materiâ*; yet will it not affect this case: for it is not within 13 Eliz. If he had been seised of this reversion in fee, and made a grant of it, the grantee, and not the creditors, would have had the benefit of it by that statute. The enact-

ing clause in 3 & 4 W. and M., which has been mentioned as relating to conveyances by the heir, has a preamble, independent of that to the former part of the statute; and though a clause may in some cases go farther than the preamble, yet certainly it cannot, when it refers to the preamble, as it does here; saying, *such creditors*, that is, such as are mentioned in the preamble, to whom a man has bound himself and devises, not where a third party devises. In constructions, *verba relata in esse videntur*: repeat the words here, and the clause will not reach this case. There is a remedy given by the act: an action may be brought against the heir at law of the obligor *and such* devisee. That again refers to the preamble: how can the devisee be charged, but in an action as devisee of the obligor? He may plead *riens per devise*, if the heir could plead *riens per descent* from the devisor. *Hæres dicitur ab hæreditate*; it is not from being *son*: for, if nothing came to him by descent, he is not heir. Had the reversion been after a life, the heir must plead it specially; because the law says, such an interest is *quasi* assets: but, in the present case, he may plead *riens per descent*; because, in law, he has nothing. Indeed, if the reversion had descended, he might have been liable; but the reason of that is, because, in pleading, he must have made himself heir to the obligor; but it is otherwise, if not connected with the debtor: as where the ancestor has a son and a daughter by one *venter*, and a son by a second, and dies; the eldest son enters and dies before any action brought, and makes *possessio fratris, &c.*; the daughter would have the lands, but she could not be charged, not being *very* heir; nor could the second son, as not having assets. Here, if the devisor had issue, and the estate tail had con-

tinued, yet he might have devised this reversion, and it would have been good: but if, after a long course of descents, the estate tail was spent, and the reversion had gone through twenty purchasers, the creditors might, after 500 years, recall this reversion to pay their debts, though the devises were good during all that time; and this for no other end but to make persons suffer recoveries, as if an omission of a legal formality created a new head of equity.

It has been objected, that the defendants were precluded by the decree, when the question was not made in the case, was not heard by the Court, nor the estate then before it. But, indeed, all that is begging the question: for, if this interest was part of the father's estate, then it was to be sold by the decree; but not if it was the son's estate, for that the Court could not bind. The father had lands, which were sold by this decree; but, when it was made, the Court could not order a sale of the reversion, for the son might have barred it after the decree.

Mr. Attorney General.—If it was true that the only business of this Court is to give a farther remedy than the law does, but strictly tied up to the rules of law, many rules of equity must be laid aside, since they cannot be accounted for. How is it, that when there are two obligors, and one dies, though there is no way at law to subject the lands of him who died, this Court does assist? So the profits of an estate, descended to the heir, cannot be reached at law; yet here they will. The true reason is, that there is a general ground in law which warrants it, that the estate descended is the creditor's, and liable to pay his debts: and in all cases, wherever the law lays down a general principle, or creates a general lien, this Court will carry it on where the law will not,

Now, suppose the obligor himself had devised this reversion, would it not then have been liable to his debts? Certainly it must, and would fall within the obvious sense of the statute. And why shall it do so now? since the law does not regard the time when it is to be applied in payment. It is true, the law says, a reversion after an estate tail is not assets; but that is only in the sense of the heir's not being charged with the debt: and yet at law it is assets whenever it vests and comes into possession. The case of *possessio fratris*, that was put, is mistaken; for, certainly, the sister would be liable, and so it appears from Thompson's Entries, 420. and 1 Lutw. 504., because she must show how she became heir, and that she is heir to him who is heir to the land. A judgement differs from a bond only in this respect, that execution may be taken upon it directly, without farther action. As to the time of 500 years, that is not an objection to this case, but to the nature of the thing; for it would be the same if there had been a judgement: it would go in course of descent, and why should it not descend *cum onere?*

Note, that the question as to Blacket's bond, which was paid out of the personal estate, was, whether he having a collateral personal security, the creditors should also stand in his place as bond creditors, and so take part of the real estate, as his bond would have done. But that was not now argued, having been spoken to at a former hearing; and the other question only directed to be argued again.

Lord Chancellor.—The first question is upon 3 & 4 W. and M. ch. 14.; whether this reversion in fee, now come into possession, ought to be considered as assets for the payment of bond debts? I had great doubt of it upon the first hearing, the question being

new and never yet determined; but, having deliberated upon it, I am of opinion that the reversion, now come into possession, is become assets to pay the debts. I agree it must depend upon the construction of the statute: for, before that, there was no method either at law or in equity to make lands devised, and the descent broke, liable to debts. The reason whereof was, that the ancestor, by his specialty, bound the heir and nobody else; and not even the heir unless he was named, but only the executors and administrators: but, where the heir was named, the law was not so unreasonable as to say, he should be personally bound farther than the extent of what came to him by descent; so that, if nothing descended, he was not subject at all. The devisee, on the other hand, was never bound; the heir being only so by naming him, and the devisee being no representative, which was very unreasonable: for, as the estate in the hands of the ancestor was so far liable, that a judgement would have bound it in him, and if he had died, leaving it to descend, the heir must have applied it, it was very hard to say that a voluntary act of the obligor should defeat the charge.

Different statutes have been made to prevent fraudulent conveyances: the 13 Eliz. is one of them, but it does not meddle with wills. The law presuming a consideration for a devise, the statute 3 & 4 W. and M. therefore became necessary, not only to give a remedy in equity, where there was no ground for one before, (since, otherwise, it would be saying a person should be chargeable here who was not chargeable at law), but, as this was an injustice and defect in the law, and to remedy it was this law made, we must then consider whether this case be within the intention of the

statute; and next, if the words be sufficient to attain that end. What is the intent? The relief of creditors against fraudulent devises; that is, to give the creditors a remedy notwithstanding the devise: not that the law thought these devises *mala in se*, any more than the 13 Eliz. does conveyances as actual frauds in themselves, but as they defeated creditors, and not otherwise. This was the general view; and, not framing the law, it was immaterial to inquire nicely, whether the devise was made by the obligor himself, or by a consequential debtor, the heir; because either the one or the other prevented the creditor from having his debt out of that, which, if suffered to go by descent, would have been liable to pay his debt; and the general intent was, to put them all upon such a footing as they would have been if the heir had taken by descent. Now, if there are words in the statute, the construction must be in that manner. We must not add words, but put such construction upon those in the act, as will best answer the end and intent of it, as far as the words will bear. So has 13 Eliz. been extended, as in Twyne's case, 3 Co. 82 *a.*, by the most liberal construction; and even in criminal cases, as 33 Hen. VIII. c. 23., for trials of murder, where criminals fly from one county to another, a power is given to try them in a foreign county by commission. The enacting part says, *within the kingdom or without*, which certainly was not meant to foreign parts, but probably Wales or the northern counties; and yet, by force of these words, commissions have issued to try murders committed abroad, as in the West Indies, Baltic, &c. (though these words were thrown in for another purpose), to suppress the mischief. In the present case, the Court ought to make the most liberal construction to avoid the evil intended

to be remedied. Now, what are the words? The preamble recites, that whereas it is not reasonable or just that, by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; and nevertheless it has so happened, that where several persons having by bond, &c. bound themselves and their heirs, &c., and died seised, having devised, &c., the enacting clause says, "Therefore all wills and testaments," &c. Now, the objection is, that the preamble is applied to a particular case, and the words of the enacting clause tied up to that. If the preamble is so, the Court can go no farther; and it is insisted likewise, that the only case in the preamble is, where persons who are obligors devise, and that the clause confirms it, making the devise void only against such creditors. But I am of opinion, that construction is much too strict, and that the words do not warrant it; there being two parts, and no reason to say that the preamble is tied up to one of them. The first case is a general one, that "it is not reasonable that, by contrivance of any debtors, their creditors should be defrauded of their just debts." Then follows a particular case, where one, who bound himself and his heirs, devises. The first words being general, the putting afterwards of a particular case will make no difference. Suppose it had been framed with only the first clause of the preamble, there could be no doubt upon it; and certainly the subsequent words do not so restrain the others as to make them useless. They are only by way of instance, not to make the act less comprehensive. This, indeed, would take in all sorts of debts, those by simple contract as well as by bond; but then a devise could not be said to be in fraud of a simple contract creditor; because, though the lands had descended,

they would not have been liable to his debt. Who is debtor? Certainly the obligor, and so is the heir at law; he is called so by the common law; so are all the cases, and the judgements against him prove it. Plowden, 440. shows that the action is brought against the heir, as bound in the specialty; and, if he was charged only in the *detinet*, it was error before the statutes of jeofails, which cure it after verdict; because he is debtor, and it lies upon him to discharge himself. Indeed, if he plead fairly, he shall be discharged according to his case; but, if he suffers judgement to go against him by default, he will be personally charged, which shows the difference between an heir and an executor; for if an executor lets judgement go against him by default, yet the creditor has judgement only *de bonis testatoris*; but, against the heir, it is a general judgement; so that it is plain the heir is a debtor, but such an one as may discharge himself by plea. If this is so, and the enacting clause makes all wills void only as against such creditor, that is, such only as could be defrauded by the devise, what is the construction of the statute upon the whole? That the fraud against creditors of any debtor (and the heir is a debtor in point of law, and within the words *any debtor*,) ought not to be allowed. So I think that the act must be construed to prevent the mischief, and that the devise of an heir at law is within the statute; and whether the lands be in possession or reversion, is just the same thing. It may be said, that the case of the obligor's dying and suffering the lands to descend, and the heir's devising them and dying, is provided for by § 5. of the statute. But that is giving the creditor only the remedy of following the heir's personal estate; for, unless the devise be fraudulent within

this statute, the lands cannot be liable to pay his debt, but only the personal estate of the heir; which would hold in the case of a reversion after an estate for life, or any other interest devised by the heir, and the same question would have been made if the lands had been in possession. It is said, a reversion expectant upon an estate tail is not assets, and the heir may plead *riens per descent;* but that does not prove that the reversion in fee, when fallen into possession, shall not be liable. If it had been suffered to descend, though through ten descents, it would have been liable, and the heir charged in the *debet* and *detinet*, as in Kellow v. Rowden, 3 Mod. 253. It is said, this reversion was never liable to the debts; but I think it is enough that there was a possibility of its being liable: there was a liableness in it, a quality in it to be so, to be subject to the debt. The saying a reversion in fee after an estate tail is not assets, is a *gross* expression, not accurate, and arises from the method of pleading allowed to the heir, that he may plead *riens per descent;* but, if the creditor may take the reversion, when it comes into possession, it shows a liableness in the thing to be assets. It is like a right descending; or, suppose a rent-seck descended, and the heir never had seisin, he might plead *riens per descent;* and if the creditor took judgement against the assets, *quando acciderint*, he might extend it whenever the heir got seisin. So, if a dry seigniory descended, the heir pleaded the same plea, and the creditor took the like judgement, because it was a thing which could not be valued; but if after, a tenancy escheated, the creditor might take out a *scire facias* on his judgement, and reach the tenancy, though the inheritance never was in the obligor, by reason of the quality in the land. 2 Inst. 293. This shows that

the expression of not being assets is a *gross* expression, and cited only in respect that it is of no present value. Then it is said the heir might have disposed of it: so he might; but, upon Apharry v. Bottingham, Cro. Eliz. 350., I doubt such a conveyance would have been void by the statute. The heir at law, as tenant in tail, might no doubt have barred it; but that may be said in all cases where a reversion in fee after an estate tail descends, and where both descend from the same ancestor, and a fine only has been levied. The entail, being barred by that means, has let in a bond, which only affected the reversion in fee. Some ambiguity arises in this case, from the two interests being in the same person; but if the estate tail was in a stranger, when it would not be in the heir's power to bar it, but the stranger might, the law would call the reversion not assets; and yet, wherever the entail be, though the heir has no power over it, if he devises it, and the entail determines, will it not be liable? I think clearly it would; and, in this sense, it stands free from the objection of the heir's being able to bar it. Suppose the obligor himself had devised the reversion, all the reasons of its being of no value and not liable, and not assets at his death in the hands of the heir, and consequently not a devise in fraud of creditors, would hold in that case as well as in this; yet it is admitted, that would have been within the act. The case put of *possessio fratris*, where the sister has the land, I am of opinion is wrong, and that the lands would be liable in her hands; but then they must show the intermediate descents, according to Lord Holt in Kellow v. Rowden, Carth. 126. The action must be brought against her as heir to her brother, who was heir to her father. I think such an action may be brought; and, to the

best of my memory, there is a precedent how to frame it, in Clift's Entries, against the heir at law of the first obligor in the second degree, and also joining the devisee of the first heir at law. But it is said, that if such an action was brought against the defendant here, he might plead that the heir, whose devisee he was, took *riens per descent;* but I am of opinion that would not be a good plea for the devisee in such case, because the nature of the thing required the heir to say *riens per descent die impetrationis brevis;* and the devisee could not say that, with regard to the writ purchased against him. Then he must say, that his testator had nothing by descent which he had devised to him, and the issue would be against him upon showing this reversion: for the quality of being subject to debts would be an estate in him to pay them. For these reasons I am of opinion, it is agreeable to the intent of the legislature, and of the statute, as well as within the words of it, that this estate should be liable to pay these debts.

The second question is, whether any difference must be made between the specialty and simple contract creditors, which are to stand in their place, in regard that this estate was not liable when the devise was made? But I think, upon the reason of this Court, in cases of this nature, that the simple contract debts must stand in their place, and that to all intents and purposes as if the specialties were not satisfied. That is the construction of all decrees, where one is to have the like remedy as the other would if not paid.

I have grounded my opinion on the statute, without entering into the question how far courts of equity would go to relieve creditors. It is certain equity has extended the remedy beyond what the

law does; as where it decrees the profits, which there is no ground for in the case of fraudulent devises under this statute; but where it is done, it is as being a fruit fallen from what is the creditor's. The like where a sale is decreed. But yet I know no case, where equity decrees a thing itself to be liable, which the law says is not liable, or is not analogous to what the law directs; except only in the case of an advowson in fee, as decreed by Lord King, in Tong v. Robinson, and affirmed in the House of Lords in 1730, which my Lord Coke says is not assets, as it cannot be extended, the law giving no remedy but by extent, *quousque debitum fuerit levatum*, except in case of collateral warranty, because there the value of the whole subject is in question. Tit. 21.

As to Blacket's bond, I think there is no difference in that; for the stock was only a collateral security: and it is declared by the defeazance, that it shall be re-transferred, and so no foundation to turn that bond on the personal estate; and this upon the rule of marshalling assets; as, if there be a mortgage on two estates, and a second only on one, if the estates will satisfy both, they shall be compelled to take, so as that all may find a satisfaction; and therefore the plaintiffs must stand in his place, as well as that of others. And so decreed the estate, descended from Thomas the father, and devised by Thomas the son, to be liable to the plaintiff's debts.

31. In the above case it appears that the bond was entered into by the person who had been once seised in fee, in possession, who afterwards created the limitations of the estate, and was also the person who had died last seised of the fee; therefore the heir, in claiming the reversion, on the determination of the particular limitations, was obliged to derive his title

Tit. 29. c. 4. to it from the obligor. But in the following case the Court of Common Pleas went a step farther, and held that a reversion was assets for payment of the bond debts of an intermediate tenant for life, who was entitled to the reversion in fee.

Smith v. Parker, 2 Black. 1230.

32. Edward Perrot devised to his brother Charles Perrot for life, remainder to his nephew Robert Perrot for life, and to his first and other sons in tail, remainder to Edward John Perrot for life, remainder to his first and other sons in tail, remainder to two other persons in the same manner, remainder to the testator's right heirs for ever. On the testator's death, Charles entered and died; Robert died without issue before the testator. Edward John entered, and, while in possession, executed the bond in question, and died without issue. The next remainder-man entered, and died without issue; and all the remainder-men being dead without issue, the lands came into the possession of the defendants, who were heirs at law, both of the testator, and of Edward John Perrot the obligor; and Edward John was also (while in possession of the premises) heir at law to the testator.

In an action of debt, brought by the obligee of this bond, the question was, whether these lands were assets by descent in the hands of the defendants.

Serjeant Adair, for the defendants, argued, that the estate in fee did not descend from the obligor to the defendants: for, though he acknowledged the remainder in fee to have been vested in Edward John, yet, being after many intermediate remainders, and three of them estates tail, it was too distant to be an actual seisin of the freehold and inheritance. That it was settled, that where there is tenant in tail with remainder in fee-simple, his estate was not assets, being too remote a contingency.

Lord Chief Justice De Grey said, he had no doubt upon the case: the only difficulty that would have arisen in these circumstances (and that no very considerable one), was, supposing all the successive tenants for life, having in them the reversion in fee, had entered into bonds, which of them should have the priority. At present, it was clear, that the heir of the obligor was debtor to the obligee, but only liable to pay the debt in respect of the assets which descended to him. How far, then, was the reversion in fee, which has taken place, assets in the hands of the heir? The true distinction was, that a reversion expectant on an estate tail, is not immediate assets; and, therefore, it cannot be extended, nor can the heir be compelled to sell it, which he may be in case of a reversion on an estate for life. But such reversion on an estate tail is assets *cum acciderit*; and the heir shall then be chargeable, which was the case before the Court.

Mr. Justice Gould was of the same opinion; and said, that a reversion after an estate tail was not valuable assets, and, therefore, could not be valued by a jury according to the statute 3 and 4 Wm. and Mary, c. 14. but, when it came into possession, it might then be valued, and should charge the heir.

Sir William Blackstone was of the same opinion, and observed, that the obligor had actual seisin of this reversion, by his own seisin as tenant for life: he might have sold it, and therefore might charge or incumber it; though, strictly speaking, his bond was no charge upon the reversion, but only upon the heir, in respect of such reversion descending. And this reversion was properly, the instant it vested in the heir, assets by descent in his hands, though only dormant potential assets, till it came into possession.

33. The authority of this case has been denied, and it has been contended, that as a person who takes a reversion by descent, must make himself heir to the donor, and take it as such, and not as heir to any of the intermediate heirs, because they never had such a seisin of the reversion as to transmit it by descent from them to any one who was not heir to the first donor; it followed, that such reversion would, in his hands, be real assets of the donor, but not assets of any of the intermediate heirs. In the case of Tweedale v. Coventry, where the question was argued before Lord Thurlow, but not decided, and the case of Smith v. Parker was relied on as the only authority, his Lordship said—"The argument there is not worth reading. I do not believe it was reported by Mr. Justice Blackstone. There the contingent uses never came into possession. It was therefore not a reversion after an estate tail, but after an estate for life only." And in giving judgement he said it was unnecessary for him to decide upon the question of the reversion; if that had been necessary, the case in the Common Pleas did not so satisfy his mind as to enable him to decide it, without referring it to a court of common law.

Tit. 29. c. 4.

1 Bro. Rep. 240.

34. The late Mr. Serjeant Williams, in his notes to Saunders, says he had compared the case of Smith v. Parker in the report, with the paper-book, which was delivered to one of the Judges who then sat upon the bench; and it appeared by it, and also by a short note taken by him on the paper-book, that the case was correctly stated by Mr. Justice Blackstone, and that the Court was of opinion the reversion was assets. But the Serjeant observes, that the case of Smith v. Parker may be found to be of doubtful authority. And that in a case determined by Lord Hardwicke, he laid it down that a reversion was not

2 Saund. 8. note.

Giffard v. Barber, infra § 37.

assets for payment of the bond debts of any person, but the ancestor from whom the lands immediately descended.

35. In a modern case Lord Alvanley denied the authority of the case of Smith v. Parker, and said— "It appears to me that it cannot be supported, without impeaching all the decisions which establish that the vesting of a reversion will not make such a *possessio fratris* as to convey the estate to the heir of the person in whom it vests." Doe v. Hutton, 3 Bos. & Pul. 651. Tit. 29. c. 4.

36. A reversion expectant on an estate tail is liable to the judgements, statutes, and recognizances of all those who were at any time entitled to it, whenever such reversion comes into possession; because these securities are liens, and attach on all the estates of the debtor. And bound by Judgements, &c.

37. Doctor Cary, being seised in fee, made a settlement to the use of himself for life, remainder to Sir George Cary for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Sir George Cary in tail male, remainder to William Cary for life, with like remainder to his first and other sons, remainder to Nicholas Cary for life, with like remainders to his first and other sons, remainder to Doctor Cary in fee. Giffard v. Barber, 4 Vin. Ab. 451. 1 Ves. Rep. 174.

Upon the death of Doctor Cary, the remainder to Sir George Cary came into possession, and the reversion descended to Sir George Cary, as heir at law to Doctor Cary.

Sir George Cary acknowledged a judgement, and died without issue; whereupon the estate limited to William Cary took effect, and the reversion in fee descended to him. He had two sons, who died; by which the reversion came into possession: and the question was, whether the reversion, when it came

into possession, was liable to the judgement acknowledged by Sir George Cary.

Lord Hardwicke was of opinion, that the reversion was liable to the judgement, because it was the estate of inheritance of Sir George Cary: and as it was so, subject to the intermediate estates for life, it was in him liable to be granted, or charged, or incumbered, as he thought fit; and as he might have granted or charged the reversion, so might he have granted a lease for 1,000 years out of it, and which would have taken effect out of the reversion in fee: and if it had come to William Cary, he could not have claimed such reversion but subsequent to that lease; and as he might have done so, in like manner might he have charged it by judgement or statute. The point that was in Kellow v. Rowden, is not applicable to this case; for, in that action, the second son was charged as immediate heir to his father; but, in this case, the reversion would not be liable to the bond debts of Sir George Cary as assets by descent, because that cannot be where there is an intermediate estate, but must be where the heir takes as immediate heir to the ancestor, who entered into the bond. But, on judgement, you charge the terre-tenant of the estate that was in the person who acknowledged the judgement, but not so by his bond, unless the lands came as assets by descent to the very heir of Sir George Cary. This, said his Lordship, will not be liable to the inconveniences I first apprehended; for, if either of the persons that took an estate tail had suffered a recovery, there would have been an end of the reversion in fee. Where there is a tenant in tail, with reversion to him in fee, and this reversion descends to the defendants, they must take it, liable to the judgement, or statute, or recognizance of any of their an-

estors, in whom the estate at any time was: and herefore I am of opinion, that this reversion is able to the judgement.

38. A reversion expectant upon an estate tail is able to the leases made by all those who were at any ime entitled to it; and to all covenants contained in hose leases; whenever such reversion comes into ossession. And also by Leases.

39. William Martin, being tenant in tail with the mmediate reversion in fee in himself, demised the remises to Elizabeth Westcombe for 99 years, if two ersons should so long live, to commence after the determination of a preceding lease. William Martin died, leaving issue Nicholas Martin his eldest son and heir; who, being the issue in tail, and also entitled to the immediate reversion in fee, levied a fine to the use of himself and his heirs. Symonds v. Cudmore, 4 Mod. 1.

It was resolved, that, as the reversion in fee came into possession by the operation of the fine, the lease became a charge on that reversion, and could not be avoided either by Nicholas Martin or the cognizee of the fine. Vide Tit. 35. c.

40. Charles Lord Shelburne, being tenant in tail male of the lands in question, with remainder to his brother Henry in tail male, remainder to his own right heirs; demised them for three lives, with covenants for perpetual renewal. Charles Lord Shelburne died without issue, by which means his brother Henry became entitled to an estate in tail male in the premises, with the reversion in fee in himself. In the year 1697, Henry Lord Shelburne levied a fine of those lands, and, in consideration of his marriage, settled them on himself for life, with remainder to his first and other sons. Shelburne v. Biddulph, 6 Bro. Parl. Ca. 356.

The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, Henry Lord Shelburne refused to renew, alleging, that as his brother Charles was only tenant in tail of the lands comprised in those leases, he had no power to make them, and was not bound by the covenants for renewal.

The Court of Exchequer in Ireland decreed, that Henry Lord Shelburne should renew those leases. From this decree, there was an appeal to the House of Lords; and, on behalf of the appellants, it was argued, that the tenant in tail at law, independent of the statute 32 Hen. VIII. had no right to make a lease absolutely to bind the issue in tail, and much less the remainder-man; and that, even by that statute, a tenant in tail has no power to grant leases to bind those in remainder; and therefore the leases in question were absolutely void as against the appellant, who did not claim under Lord Charles, or as issue in tail, but as remainder-man. That the estate tail, out of which the leases first arose, being spent, and the appellant not claiming under it but by a distinct limitation to himself in tail male, his fine could not let in Lord Charles's leases upon that estate, which came in lieu of the Earl's estate tail; nor could it, by consolidating the two estates, let them in upon the reversion, both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement, by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first and other sons: and these estates arose and were granted out of the estate tail, which the Earl had before the fine, and not out of a reversion.

On the other side it was contended, that by the ne which Earl Henry levied in 1697, the estate tail nited in remainder to him was barred and extinished in the same manner to all intents and purposes if he was dead without issue; and the reversion in e which descended to him as heir of Lord Charles, mediately took effect in possession: and as the ew uses of the marriage settlement of 1697 arose ut of that reversion in fee, they were therefore subect to all antecedent incumbrances and engagements, hich could affect that reversion. That as this reverion in fee, after it had taken effect in possession by eans of a fine, was specifically bound by the covenants for perpetual renewal; and as such covenants re considered as real agreements, and go with the and, so they are, in their nature, proper for a specific erformance, and would, in equity, affect the legal interest of all those who take the estate with notice of them. That all those claiming under the settlement of 1697, had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl Henry himself, especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. After hearing counsel on this appeal, the following question was put to the Judges, viz. "Whether, by the fine levied by the appellant the Earl of Shelburne in Easter term 1697, the reversion in fee of the estate in question was let in, subject to the leases in question, made by Charles Lord Shelburne, and the covenants therein contained for a perpetual renewal?" And the Lord Chief Justice of the King's Bench having delivered the unanimous opinion of the Judges to this effect, viz. "That the leases for lives now in being were good and effectual, as being served out of

the reversion in fee, which Lord Charles had when he made them, and which was now in Lord Henry; and that the covenants for renewal were binding on Lord Henry, as a lien on the same reversion, which he had let in by barring, discharging, and extinguishing his estate tail." It was, therefore, ordered and adjudged, that the appeal should be dismissed, and the decree therein complained of affirmed.

All particular Estates merge in the Reversion.

41. All particular estates are subject to merge in the reversion, whenever the same person becomes entitled to both, except estates tail. And when the protection of the statute *De Donis conditionalibus* is taken away from estates tail, they then merge in the reversion; and become liable to the charges and leases of all those who were at any time entitled to such reversion.

Tit. 35. c.12.

TITLE XVIII.

JOINT TENANCY.

CHAP. I.

Of the Nature of an Estate in Joint Tenancy.

CHAP. II.

How a Joint Tenancy may be severed and destroyed.

CHAP. I.

Of the Nature of an Estate in Joint Tenancy.

1. *Number and Connexion of the Owners of Estates.*
2. *Estates in Severalty.*
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12. *Circumstances required in this Estate.*
13. *Unity of Interest.*
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58. *Except by Lease.*
60. *In what Cases they must all join.*
64. *The Possession of one is that of the other.*
65. *Remedies against each other.*

SECTION 1.

Number and Connexion of the Owners of Estates.

WITH respect to the number and connexion of the owners of estates, lands and tenements may be held in four different ways; namely, in severalty, joint tenancy, coparcenary, and common.

Estates in Severalty.

2. Where a person holds lands in his own right only, without having any other joined or connected

with him in point of interest, during his estate therein, he is said to hold in severalty.

In Joint Tenancy. Lit. § 277.

3. But where lands are granted to two or more persons, to hold to them and their heirs, or for term of their lives, or for term of another's life, without any restrictive, exclusive, or explanatory words; all the persons named in such instrument, to whom the lands are so given, take a joint estate, and are called joint tenants. For the law will interpret it so as to make all the parts take effect; which can only be done by creating an equal interest in all the persons who take under it.

4. An estate in joint tenancy can only arise by purchase or grant; that is, by the act of the parties, and never by the mere act of law. As to the words by which this estate may be created, the cases on that point will be found in Title XXXII. *Deed*, and Title XXXVIII. *Devise*.

1 Inst. 183 *b*.

5. An estate in joint tenancy may be had in remainder. Thus, if a gift be made to two men, and the heirs of their two bodies, remainder to them two and their heirs; they are joint tenants of the remainder in fee.

Lit. § 285.

6. Where lands are conveyed to two persons, and the heirs of one of them, they are joint tenants for life, and the fee simple is in one of them. If the person who has the fee dies, the other shall hold the entirety, by survivorship, during his life. In the same manner where lands are given to two persons, and the heirs of the body of one of them, they are joint tenants for life, and the estate tail is in one of of them.

1 Inst 184 *b*. *n* 2.

7. Lord Coke says, when land is given to two, and to the heirs of one of them, he in remainder cannot grant away his fee simple.

Mr. Hargrave observes, that there is a seeming difficulty in this passage, but conceives Lord Coke's meaning to be, that though for some purposes the estate for life of the joint tenant having the fee, is distinct from, and unmerged in, his greater estate; yet for granting, it is not so; but both estates are in that respect consolidated, notwithstanding the estate of the other joint tenant. Therefore, that the fee cannot, in strictness of law, be granted as a remainder, *eo nomine*; and as an interest distinct from the estate for life.

8. Two persons may have an estate in joint tenancy for their lives, and yet have several inheritances. Thus Littleton says, "If lands be given to two men, § 283. and to the heirs of their bodies begotten, the donees have a joint estate for term of their lives, and yet they have several inheritances. For if one of the donees hath issue and die, the other which surviveth shall have the whole term for his life: and if he which surviveth also have issue and die, then the issue of one shall have one moiety, and the issue of the other, the other moiety; and they shall hold the land between them in common; and are not joint tenants, but tenants in common. And the cause why such donees have a joint estate for term of their lives is, for that at the beginning the lands were given to them two; which words, without more saying, make a joint estate to them for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them, as a man and a woman may, the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift: and this is, to the heirs which the one shall beget of his body by any of his wives; and to the heirs which the other shall beget of his

body by any of his wives: so as it behoveth by necessity of reason that they have several inheritances."

§ 284. Cook v. Cook. 2 Vern. 545.

9. Littleton says, it is the same where lands are given to two females, and the heirs of their two bodies. And Lord Cowper has observed that where there was a devise to the testator's two daughters, and the heirs of their two bodies, it was a joint estate for life, with several inheritances. But the testator never meant that the surviving daughter should turn out the issue of her deceased sister. That was the point upon the appeal in Wilkinson v. Spearman, where the Lords inclined to the appellant; yet the Judges all agreeing that the law was so settled, the Lords would not alter it. His Lordship also said, that a devise to the testator's two daughters and their issue, and in default of such issue, to J. S., gave them a joint estate for life, and several inheritances.

Printed Cases, 1705. 2 P. Wms. 530.

1 Inst. 184 *a*.

10. If a person gives lands to two men and one woman, and the heirs of their three bodies begotten; in this case they have several inheritances. For though it might be said that the woman may by possibility marry both the men, one after another; yet first, she cannot marry them both *in præsenti*; and the law will never intend a possibility upon a possibility; as first to marry the one, and then to marry the other, So it is if a gift be made to one man and two women, *mutatis mutandis*.

Id.

11. In the same manner if a gift in tail be made to a man and to his mother, or to a man and to his sister, or his aunt, the parties take several inheritances; because they cannot marry. Lord Coke says, that in all these cases there is no division between the estates for life, and the several inheritances: for they cannot convey away the inheritance after their decease, because it is divided only in supposition and

Id. 182 *b*.

consideration of law; and to some purposes the inheritance is said to be executed.

12. The nature of a joint tenancy requires the following circumstances: 1. Unity of interest, 2. Unity of title, 3. Unity of time, 4. Unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at the same time, and held by one and the same undivided possession. Circumstances required in this Estate. 2 Comm. 180.

13. With respect to unity of interest, one joint tenant cannot be entitled to one period of duration, or quantity of interest, and the other to a different one. One cannot be tenant for life, and the other for years; one cannot be tenant in fee, and the other tenant in tail. It has however been stated, that where an estate is limited to two persons, and to the heirs of one of them, they are joint tenants for life. Unity of Interest. ante, § 6.

14. If a man demises lands to two persons, to hold to the one for life, and to the other for years, they are not joint tenants. For an estate of freehold cannot stand in jointure with a term of years, and a reversion upon a freehold cannot stand in jointure with a freehold and inheritance in possession. 1 Inst. 188 *a*.

15. It is however said by Lord Coke, that a right of action and a right of entry may stand in jointure. For at common law the alienation of the husband was a discontinuance to the wife, of one moiety, and a disseisin of the other; so as after the death of the husband, the wife had a right of action to one moiety, and the other joint tenant a right of entry into the other: but they were joint tenants of the right, because they might join in a writ of right. Id.

16. Secondly, that a right of action, or a bare right of entry, cannot stand in jointure with a freehold or inheritance in possession: therefore, if the husband made a feoffment of the moiety, this was a discon- Id.

tinuance of that moiety; and the other joint tenant remained in possession of the freehold and inheritance of the other moiety; which, for the time, was a severance of the jointure.

Unity of Title. Lit. § 277, 8.

17. As to the unity of title, the estate of joint tenants must be created by the same act or instrument, whether legal or illegal; as by one and the same feoffment, grant, fine, or other conveyance or assurance, or by one and the same disseisin; for a joint tenancy cannot arise by descent, or act of law, as has been already observed, but merely by purchase or acquisition of the party.

Unity of Time.

18. With respect to unity of time, the estate must become vested in all the joint tenants at one and the same instant; as well as by one and the same title.

1 Inst. 188 *a*.

Thus, if lands be demised for life, remainder to the right heirs of J. S. and J. N., J. S. hath issue and dies, and after J. N. hath issue and dies; the issues are not joint tenants; because the one moiety vested at one time, and the other moiety at another time.

Id. Gilb. Uses, 71.

19. Lord Coke, however, says, that in some cases there may be joint tenants, and yet the estate may vest in them at several times. Thus, if a man makes a feoffment, to the use of himself, and of such wife as he shall afterwards marry, for term of

Tit. 16. c. 5. § 21.

their lives; and after he takes a wife; they are joint tenants; and yet they come to their estates at several times.

Blandford v. Blandford, 3 Bulst. 101.

20. A man made a feoffment in fee, to the use of himself for life, then to the use of every one of his issue female, and to the heirs of their bodies; then to the issue of one daughter at one time, of a second daughter at another time, and of a third daughter at another time; so that this was to vest severally in them, and afterwards to all. Lord Coke said it was adjudged that they were joint tenants; and yet they

came in at several times; but the reason of this was, because the root was joint.

21. A person levied a fine to the use of himself for life, remainder to his wife for life, remainder to Sir Peter Temple and Anne his wife, for their lives, and the life of the survivor of them; remainder to their first and other sons in tail, remainder to the issues female of their bodies, and the heirs of their bodies begotten. Sir Peter Temple had issue by Anne two daughters, Anne and Martha. Martha died without issue; afterwards Anne died. It was argued that the two sisters were tenants in common. But, *per* Holt, the estate was limited by way of use to the issues female, and issues female comprehended all issues female. Then the case was, tenant for life, remainder to all his issues female, &c. If the tenant for life has but one daughter, she shall have the whole estate tail; if he has more daughters, they shall be joint tenants for life, with several inheritances. The case in Coke Lit. 188 *a.* of a feoffment to the use of himself for life, and of such wife as he should afterwards marry, and then he marries; he and his wife are joint tenants; would rule the case in question; for it was a joint claim by the same conveyance which made joint tenants, and not the time of vesting.

Sussex v. Temple, 1 Ld. Raym. 310.

ante, § 19.

22. A person devised lands to his two sons, and the heirs of their bodies; and that his executors should have them until they came to their several ages of 21 years. The question was, whether one of them might enter; for it was objected, that it was a joint estate to them, which could not be, if they should have several commencements. But four of the Judges were of opinion, that when either of them came to the age of 21, he should then have his part

Aylory. Chep, Cro. Jac. 259.

and possession; and yet the joint tenancy should take place.

Oates v. Jackson, 2 Stra. 1172.

23. Lands were devised to a woman and her children, on her body begotten, or to be begotten, by W. A., and their heirs for ever. It was determined, that the devisee and all her children took as joint tenants; and it was no objection that by this means the several estates might commence at different times.

24. Although some of the persons to whom an estate is limited are in by the common law, and others by the statute of uses, yet they will take it in joint tenancy.

Watts v. Lee, Noy, 124. Sammes's Case, Tit. 32. c. 21.

25. A fine was levied to A. and B., to the use of the said A. and B. and also to C. Adjudged, that they were all joint tenants; though A. and B. were in by the fine, and C. by the statute of uses.

Stratton v. Best, idem.

26. In a modern case, which will be stated hereafter, Lord Thurlow held, that whether a settlement was to be considered as a conveyance of a legal estate, or a deed to uses, would make no difference; and that the vesting at different times would not prevent its being a joint tenancy.

Unity of Possession. Lit. § 288.

27. With respect to unity of possession, joint tenants are said to be seised *per my et per tout;* that is, each of them has the entire possession, as well of every part, as of the whole. They have not, one of them a seisin of one half, and the other of the remaining half: neither can one be exclusively seised of one acre, and his companion of another; but each has an undivided moiety of the whole, not the whole of an undivided moiety. From which it follows, that the possession and seisin of one joint tenant, is the possession and seisin of the other.

Joint Tenancies go to the Survivor.

28. The union and entirety of interest which exists between joint tenants, has given rise to the principal incident to this estate, which is, the right of survivorship. Thus Littleton says;—"If three joint tenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joint tenant hath issue, and die, yet the third which surviveth shall have the whole tenements to him and his heirs for ever." § 280.

29. The right of survivorship takes place in estates for years, as well as in freehold estates. Thus Littleton says,—"If a lease of lands or tenements be made to many, for term of years, he which surviveth of the lessees shall have the tenements only, during the term, by force of the same lease." And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. § 281. 1 Inst. 46 b.

30. The trust of a term in joint tenancy shall go to the survivor, in equity as well as at law.

Aston v. Smallman, 2 Vern. 556. 2 P. Wms. 530.

31. A lease was made for 99 years, in trust for Eleanor and Mary Smith. Eleanor died; her executor obtained an assignment of the lease from the trustee; the administrator of the other sister brought a bill to have the whole term by survivorship.

Lord Cowper said, a trust of a term must go as the term at law would have gone; and as survivorship would have taken place at law, it must do so in equity. Decreed, the defendant to account for the profits from the death of Eleanor, and to assign the term to the plaintiffs, or as they should appoint.

Rex v. Williams, Bunb. 342.

32. Two joint purchasers of a lease for years assigned it to a third person, who was a friend of one of the joint tenants, with the consent of the other.

but it was without consideration, and no declaration of trust was given; which the defendant confessed in his answer. The question was, whether this trust should result for the benefit of the survivor, or whether the creditors of the joint tenant who died, should come in for an equal moiety in equity. The two joint tenants had continued to receive the profits jointly, after the assignment.

The Court was of opinion, that though the right of survivorship was looked upon as odious in equity; yet in this case, the trust should survive, for the benefit of the surviving *cestui que trust* only.

1 Inst. 181 *b*. 33. There are, however, some cases in which there may be a joint tenancy, without an equal right of survivorship. Thus, if lands are let to A. and B. during the life of A., if B. dies, A. shall have all by survivorship; but if A. dies, B. shall have nothing.

Not favoured in Equity. 34. As the right of survivorship is often attended with hardship and injustice, the courts of equity have taken a latitude in construing against joint tenancies, on the ground of intent.

Petty v. Styward, 1 Ab. Eq. 291. 35. Thus where two persons advanced a sum of money by way of mortgage, took the mortgage to themselves jointly, and then one of them died. Decreed, that when the money came to be paid, the survivor should not have the whole, but that the representative of the person who died should have a proportion.

Idem. 36. It is laid down by Sir Joseph Jekyll, that if two or more purchase lands, advance the money in equal proportions, and take a conveyance to them and their heirs, it is a joint tenancy; that is, a purchase by them jointly of the chance of survivorship. But when the proportions of the money are not equal, and this appears in the deed itself, it makes them in

the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the other, in proportion to the sums advanced by each of them. So if two or more make a joint purchase; afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies: this shall be a lien on the land, and a trust for the representative of him who advanced it.

37. The defendant Craddock's father, the plaintiff Lake, and three others, five in all, having entered into an undertaking to drain the overflowed lands of West Thorock; the trustees for the sale, by the consent and direction of the commissioners of sewers, did by deed indented and enrolled, dated the 8th February 1695, in consideration of 5,145*l.* paid to the commissioners by the five purchasers, convey the same to the defendant Craddock's father, the plaintiff Lake, the three others, and their heirs; upon which several sums of money were expended in carrying on the undertaking. The plaintiff Lake brought his bill against the rest of the partners, or their representatives, for an account and division of the partnership estate; the only question was, whether these five purchasers, having made this purchase jointly, so as to become in law joint tenants, the same should survive in equity. Sir Joseph Jekyll decreed that no survivorship should take place; for that the payment of money created a trust for the parties advancing the same; and an undertaking upon the hazard of profit or loss was in the nature of merchandizing, when the *jus accrescendi* was never allowed. That supposing one of the partners had laid out the whole money, and had happened to die first, according to the contrary construction, he must have lost all, which

Lake v. Craddock, 3 P. Wms. 158.

would have been most unjust. Wherefore it was decreed, that these five purchasers were tenants in common. Upon an appeal, the decree was affirmed by Lord King.

2 Ves. 258.

38. Lord Hardwicke has assented to this doctrine, and has observed, that the Court of Chancery had taken a latitude in construing a tenancy in common, without the words *equally to be divided*, on the foot of the intent; and therefore determined, that if two men jointly and equally advance a sum of money on a mortgage, suppose in fee, and take that security to them and their heirs, without the words "equally to be divided between them," there shall be no survivorship. So, if they were to foreclose the estate, it should be divided between them, because their intent was presumed to be so. It had been said, indeed, that if two men made a purchase, they might be understood to purchase a kind of chance between themselves, which of them should survive: but it had been determined, that if two purchased, and one advanced more of the purchase money than the other, there should be no survivorship, though there were not the words "equally to be divided," or "to hold as tenants in common;" which showed how strongly the Court had leaned against survivorship, and created a tenancy in common by construction, on the intent of the parties.

Who may be Joint Tenants.

39. All natural persons may be joint tenants; but bodies politic or corporate cannot be joint tenants with each other. Neither can the king, or a corporation, whether sole or aggregate, be joint tenant with a natural person.

1 Inst. 190 *a*.

40. Thus Lord Coke says,—If lands be given to two bishops, to have and to hold to them two, and their successors; seeing they take this purchase in

heir political capacity, as bishops, they are not joint enants; because they are seised in several rights; or the one bishop is seised, in right of his bishopric, of the one moiety, and the other bishop, in right of his bishopric, of the other moiety; and so by several titles, and in several capacities: whereas joint tenants ought to have it in one and the same right and capacity, and by one and the same joint title.

41. But if lands be given to A. de B. bishop of N., and to a secular man, to have and to hold to them two and to their heirs; in this case they are joint tenants; for each of them takes the lands in his natural capacity. Idem.

42. This rule does not, however, hold in the case of chattels real: for if a lease for years be made to a bishop and a secular man, they are joint tenants; because, in this case, the bishop does not take in his political capacity. Idem.

43. If lands be given to the king, and to a subject, to have and to hold to them and to their heirs, yet they are not joint tenants; for the king is not seised in his natural capacity, but in his royal and political capacity, *jure coronæ*; which cannot stand in jointure with the seisin of a subject, in his natural capacity. Idem.

44. Lord Coke also says, if an alien and a natural-born subject purchase lands in fee, they are joint tenants: but the king, upon office found, shall have a moiety. 1 Inst. 180 *b.* *n.* 2.

45. Husband and wife being considered in law as one person, if an estate be conveyed to husband and wife, and to a stranger, the husband and wife will only take one moiety between them, and the stranger will take the other moiety. Lit. § 291.

46. As there can be no moieties between husband and wife, they cannot be joint tenants; therefore, Husband and Wife cannot be Joint Tenants.

where an estate is conveyed to a man and his wife, and their heirs, it is not a joint tenancy; for joint tenants take by moieties, and are each seised of an undivided moiety of the whole. But husband and wife being but one person, cannot, during the coverture, take separate estates; therefore, upon a purchase made by them both, each has the entirety, and they are seised *per tout*, and not *per my*; the husband cannot forfeit or alien the estate, because the whole of it belongs to his wife, as well as to him.

Lit. § 291.

1 Inst. 187 *a*.

47. William Ocle and Joan his wife purchased lands to them two, and their heirs. Afterwards William Ocle was attainted of high treason, for the murder of the king's father, Edward II., and was executed; Joan his wife survived him. King Edward III. granted the lands to Stephen de Bitterby and his heirs. John Hawkins, the heir of the said Joan, in a petition to the king, disclosed this whole matter; and, upon a *scire facias* against the patentee, had judgement to recover the lands.

Back v. Andrews, 2 Vern. 120. Prec. in Cha. 1.

48. J. Andrews purchased a copyhold estate, and took a surrender of it to himself, his wife, and his daughter, and their heirs. J. Andrews being visible owner of the estate, mortgaged it to the plaintiff, and died. The plaintiff brought his bill against the mother and daughter to discover their title, and to set aside their estates, as fraudulent against the plaintiff, who was a purchaser.

The Court dismissed the bill; because the husband and wife took one moiety by entireties, so that the husband could not alien or dispose of it, to bind the wife, and the other moiety was well vested in the daughter.*

* Vide Effingham v. Carew, 1 And. 39. and Dyer, 332, contra.—This was not a decision of a court of justice; but only an award.

49. A copyhold estate was surrendered to the use John Fitzwalter and Elizabeth his wife, and the ager liver of them; after the death of the longer er, to the right heirs of the said John and Eliza- th for ever. Green v. King, 2 Black. Rep. 1211.

Lord Chief Justice De Grey said, this case fell actly within a nice distinction laid down in our ient law books, and which, having never been er-ruled, continued to be law. The same words of nveyance, which would make two other persons int tenants, would make a husband and wife tenants f the entirety: so neither could sever the jointure, ut the whole must accrue to the survivor.

Sir W. Blackstone observed, that this estate differed om joint tenancy, because joint tenants took by oieties, and were each seised of an undivided moiety f the whole, *per my et per tout*; which drew after it he incident of survivorship, or *jus accrescendi*. But usband and wife being considered in law as one erson, they could not, during the coverture, take eparate estates; upon a purchase made by them oth, they could not be seised by moieties, but both nd each had the entirety. They were seised *per tout*, and not *per my*; the husband therefore could not alien or devise that estate, the whole of which belonged to his wife, as well as to himself.

50. A person devised a copyhold estate to John Freestone and Lucy his wife, and to their heirs and assigns for ever. J. Freestone the devisee was admitted, and surrendered to James Rickson in fee. Upon the death of John Freestone, Lucy his widow was admitted, and brought an ejectment against the person who claimed under her husband's surrender. Doe v. Parratt, 5 Term R. 652.

Lord Kenyon.—"We are now in a court of law, and we are called upon to decide the legal rights of

the parties. It seems to me, from the manner in which the case is drawn, to have been intended to be argued, that the devise in the first will to J. Freestone and Lucy his wife, created a joint tenancy; but that question has been properly abandoned: for though a devise to A. and B., who were strangers to, and have no connexion with each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy, and passes a moiety; yet it has been settled for ages, that when the devise is to the husband and wife, they take by entireties, not by moieties; and the husband alone cannot, by his own conveyance, without joining his wife, divest the estate of the wife. This is sufficient to warrant us, sitting in a court of law, in determining in favour of the present plaintiff."

Vide Owen v. Morgan, Tit. 36. c. 10.

1 Inst. 187 *b.* Moody v. Moody.

51. But where an estate is conveyed to a man and a woman who are not married, and who afterwards intermarry; as they took originally by moieties, they will continue to hold by moieties, after the marriage.

Joint Tenancies not subject to Dower or Curtesy. Lit. § 45. 1 Inst. 37 *b.*

52. The widow of a joint tenant in fee or in tail, is not entitled to dower; because, upon the death of one of the joint tenants, the estate goes to the survivor; who is then in from the first feoffor or donor, and may plead such feoffment or gift as originally made to himself, without naming his companion.

1 Inst. 30 *a.* 183 *a.*

53. It was formerly held, that where lands were given to two women, and the heirs of their two bodies begotten, the husband of one of them, having issue, should be tenant by the curtesy, living the other sister; the inheritance being executed. But Lord Coke observes, that Littleton has cleared up this doubt, by shewing that the inheritance is not executed; therefore the husband cannot be entitled to an estate by the curtesy.

54. In consequence of the right of survivorship among joint tenants, all charges made by a joint tenant on the estate, determine by his death, and do not affect the survivor. For it is a maxim of law, that *jus accrescendi præfertur oneribus.* Joint Tenants cannot charge their Estates. 1 Inst. 185 *a.*

55. Thus Littleton says, if there are two joint tenants in fee, and one of them grants a rent-charge, by deed, out of that which belongs to him; in this case, during the life of the grantor, the rent-charge is effectual; but after his decease, it is void; for he who hath the land by survivorship shall hold it discharged; because he is in by survivorship, and claims under the original feoffment, not by descent from his companion. § 286.

56. If one joint tenant acknowledges a recognizance, or a statute, or suffers a judgement in an action of debt to be entered up against him, and dies before execution had, it shall not be executed afterwards; but if execution be sued in the life of the cognizor, it shall then bind the survivor. But Lord Coke observes, that as well in the case of a rent-charge, as of a recognizance, statute, or judgement, if he who makes the charge survives, it is good for ever. 1 Inst. 184 *a.* Abergavenny's Case, 6 Rep. 78. Vide Tit. 14. § 76.

57. If one joint tenant in fee simple be indebted to the king, and dies, no extent shall be made, after his decease, upon the land, in the hands of the survivor. 1 Inst. 185 *a.*

58. There is one exception to this rule; for if there are two joint tenants in fee, and one of them makes a lease for years to a stranger, it will be good against the survivor; even though such lease does not commence till after the death of the joint tenant who made it; because it is an immediate disposition of the land. Except by Lease. 1 Inst. 185 *a.* 2 Roll. Ab. 89. 2 Vern. 323.

59. If two persons are joint tenants for life, and one grants his moiety to J. S., to have for certain Whitlock v. Huntwell, 2 Roll. Ab. 89.

years, to commence after the death of his companion; and the other moiety to the said J. S. by the same deed, to have from the death of the lessor for certain years, and dies; the survivor shall hold the land discharged of any lease, notwithstanding this grant. For the lease of his own moiety, which he might have leased, was not to commence till after the death of his companion, and he had not any power to lease the other moiety which belonged to his companion; so all was void.

In what Acts they must all join.

60. In consequence of the intimate union of interest and possession which exists between joint tenants, they are obliged to join in many acts. Thus

1 Inst. 67 *b*.

joint tenants must formerly have done homage, and must now do fealty together.

61. There are however many cases where they need not all join; and where the act of one will be

6 Mod. 44.

considered as the act of all. Thus the entry of one joint tenant is deemed the entry of all; and the seisin and possession acquired by such entry, is the seisin

infra.

and possession of them all.

62. Every act done by one joint tenant, for the benefit of himself and his companion, shall be

1 Inst. 49 *b*.

deemed the act of both. Thus livery of seisin made to one joint tenant will enure to both: the entry or re-entry of one joint tenant is as effectual

Id. 192 *a*.

as that of both. So, where joint tenants make a lease, and the lessee surrenders to one of them, this will enure to both; because they have a joint reversion.

2 Inst. 302. Tit. 3. c. 2.

63. If there are two joint tenants for life or years, and one of them commits waste, this is deemed waste by them both, as to the place wasted; but treble damages shall be recovered only against the person who actually committed the waste.

64. It has been stated, that in consequence of the unity of possession which exists between joint tenants, the possession of one is the possession of the other; from which it follows, that a joint tenant can never be disseised by his companion, but by an actual ouster. So that if one joint tenant levies a fine of the whole, it will not amount to an ouster of his companion.

The Possession of one is that of the other. 1 Salk. 392. 2 — 423.

65. At common law joint tenants had no remedy against each other, where one alone had received the whole profits of the estate; for he could not be charged as bailiff or receiver to his companion. But now, by the statute 4 & 5 Ann. c. 16. § 27. actions of account are maintainable by one joint tenant, his executors or administrators, against the other, as bailiff, for receiving more than his share.

Remedies against each other. 1 Inst. 200 b.

66. By the statute of Westm. 2. c. 22., one joint tenant may have an action, by writ of waste, against his companion. But Lord Coke observes, that this act does not extend to castles, houses, or other places for habitation of man; for one joint tenant might, for their reparation, have had a writ *De reparatione faciendâ*, at common law.

2 Inst. 403.

TITLE XVIII.

JOINT TENANCY.

CHAPTER II.

By what Means a Joint Tenancy may be severed and destroyed.

2. *Destruction of the Unity of Interest.*
8. *Of the Unity of Title.*
9. *Of the Unity of Possession.*
10. *By Alienation to a Stranger.*
19. *Exception,—Devise.*
20. *By an Agreement to alien.*
22. *By the Alienation of one Joint Tenant to the other.*
29. *By voluntary Partition.*
30. *By Writ of Partition.*
42. *By Partition in Chancery.*
45. *By an Agreement to make Partition.*
49. *By devolving to one Person.*

Section 1.

AN estate in joint tenancy may be severed and destroyed by the destruction of any of its constituent unities, except that of time; which, as it respects only the original commencement of the estate, cannot be affected by any subsequent transaction.

Destruction of the Unity of Interest.

2. An estate in joint tenancy is destroyed by the destruction of the unity of interest, which may be done either by the act of the parties, or by the operation of law.

1 Inst. 182 *b*.

3. Thus Lord Coke says, If a man makes a lease to two for their lives, and after grants the reversion to one of them in fee, the jointure is severed, and the reversion is executed for the one moiety; and for the other moiety, there is tenant for life, the reversion to the grantee.

4. A. tenant for life, remainder to B. and three others for life, the reversion to C. and his heirs expectant. C. levied a fine to A. and B., to the use of A. for life; after his death, to the use of B. in fee. A. died, and afterwards B. died. The question was, whether the jointure was severed or not. Wiscot's Case, 2 Rep. 60.

It was resolved, that the jointure was severed, and this difference taken; when the fee is limited by one and the same conveyance, there one person may have a fee simple, and the other an estate for life, jointly; but when they are first tenants for life, and afterwards one of them acquires the fee simple, there the jointure is severed. As if a man makes an estate to three, and to the heirs of one of them, there one of them hath fee simple, yet the jointure continues; for all is but one entire estate, created at one and the same time: therefore the fee simple cannot merge the jointure, which took effect with the creation of the remainder in fee. But when three are joint tenants for life, and afterwards one purchases the fee, there the fee simple merges the estate for life; for the estate for life was *in esse* before, and might be merged or surrendered, and so cannot the estate for life in the first case. In the same case, that is to say, when an estate is made to three, and to the heirs of one of them, and he who hath the fee dies, and one of the survivors purchases the remainder, the jointure is severed, *causa qua supra.* And when one tenant for life purchases the reversion in fee, if the jointure should remain, he would have a reversion in fee, and an estate for life also in part; which reversion in fee he might grant over, and his estate for life would remain in part; which would be absurd, and against reason: for, in the first case, when an estate is made to three, and to the heirs of one, he who hath

ante, c. 1. the fee cannot grant over his remainder, and continue in himself an estate for life.

1 Inst. 182 *b*. 5. So, if a lease be made to two men for term of their lives, and after, the lessor grants the reversion to them two, and to the heirs of their two bodies, the jointure is severed.

6. Where the reversion in fee descends to one of the persons who is joint tenant for life, the joint tenancy will thereby be severed.

2 And. 202. 7. A man, having issue three sons, devised lands to his two youngest sons jointly for their lives. Afterwards, the eldest son, who had the reversion in fee, died, by which it descended to the second son. This was held to be a severance and destruction of the jointure, by operation of law.

Of the Unity of Title. Lit. § 292. 8. An estate in joint tenancy may also be destroyed by the destruction of the unity of title. Thus, if one of the joint tenants conveys his share to a stranger, it is a severance of the joint tenancy, for the grantee and the remaining tenant hold by several titles; the alienee coming into one moiety by the conveyance of one of the joint tenants, and the other joint tenant holding the other moiety by the first feoffment.

Of the Unity of Possession. 9. Another mode of destroying an estate in joint tenancy is, by disuniting the possession; for joint tenants being seised *per my et per tout*, every thing that tends to narrow that interest, so that each of them ceases to be seised of the whole, and of every part, is a severance and destruction of this estate.

By Alienation to a Stranger. 10. It has been stated that an alienation by one joint tenant to a stranger, severs the joint tenancy, by destroying the unity of title. It also severs it, by destroying the unity of possession; for the alienee and the remaining tenant have several freeholds.

11. Littleton says, if there be two joint tenants in fee, and one of them makes a lease for life to a stranger, the joint tenancy is severed. Lord Coke says, that in this case there is also a severance of the reversion. And it has been stated, that a lease for years made by one joint tenant will bind his companion, so that it operates as a severance *pro tanto*. § 302. ante, c. 1. § 58.

12. So, if two joint tenants be of a lease for 21 years, and the one of them lets his part for certain years, part of the term, the jointure is severed, and the survivorship destroyed; because a term for a small number of years is as high an interest as for many more years. 1 Inst. 192 *a*.

13. A mortgage by a joint tenant, for a term of years, will operate as a severance of the joint tenancy.

14. Three persons being joint tenants of the trust of a term for years, one of them mortgaged his third part. The question was, whether the joint tenancy was severed. York v. Stone, 1 Ab. Eq. 293. 1 Salk. 158.

Lord Cowper held that it was a severance; for, in the case of a joint tenancy, which was a thing odious in equity, it would be a disadvantage to the mortgagor not to have it construed a severance.

15. Alienations of this kind must, however, be valid and good in law, to have this effect; therefore a conveyance by a joint tenant to his wife, being void at law, will not operate as a severance of a joint tenancy. Tit. 32. c. 2.

16. A joint tenant of a church lease, being taken ill on a journey, and wishing to sever the joint tenancy, that he might provide for his wife, sent for the schoolmaster of the town, and directed him to prepare an instrument for that purpose. The schoolmaster drew a kind of deed of gift of the lease from the sick man to his wife, which he executed, and died. The deed being void in law, the widow en- Moyse v. Giles, Prec. in Cha. 124.

deavoured to establish it in equity; but her bill was dismissed, it being voluntary and without consideration.

17. Articles of agreement by an infant, though made in consideration of marriage, will not operate as a severance of a joint tenancy.

May v. Hook, 1 Inst. 246 *a*. *n*. 1. 1 Bro.R. 112.

18. Ann May, previous to her marriage, being then an infant, and possessed of a considerable leasehold estate, held in joint tenancy with her two sisters, by articles of agreement made between her, of the first part, John Hook, her intended husband, of the second part, and trustees of the third part, covenanted and agreed that the leasehold estates should be assigned to John Hook, for his own use and benefit. The marriage took effect. Ann May died under age. The question was, whether these articles were, in equity, a severance of the joint tenancy.

Lord Bathurst said, the first point attempted to be established was, that had Ann May been of full age when she entered into the articles, they would have amounted to a severance; but no determination to that effect had ever been made. That the co-joint tenants were not in this case to be considered as volunteers, as they claimed by a title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor. That the utmost which the infant could do would be an avoidable act, and of course it would be in the discretion of the Court, either to give or refuse their assistance to it. By a parity of reason, it must always be in their power to model such contracts at their pleasure. That the contract in the present case was not such as the Court would uphold. Had the infant lived to come of age, and a bill been

infra, § 20.

filed against her for the performance of the articles, the Court would have set them aside, and referred it to a Master to draw new proposals for a proper settlement. As the contract was not such as would have bound the infant herself, *à fortiori*, it should not bind the co-joint-tenants. That it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint tenancy; as, if that were allowed, it would always be in the power of the infant to say whether the joint tenancy should be severed or not. Then, if any of the co-joint tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title by survivorship; which would be a great injustice and hardship on the co-joint tenants. On these grounds, he was of opinion that the articles did not amount, in equity, to a severance of the joint tenancy.

Exception. Devise.

19. Regularly every disposition by one joint tenant, in order to bind his companion, must be an immediate disposition; for the other joint tenant claiming the whole, under the original feoffment or grant, the whole must descend to him, unless his companion has disposed of his share in his lifetime. From which it follows, that a devise can in no case operate as a severance of a joint tenancy; it being a maxim of law, that *jus accrescendi præfertur ultimæ voluntati.*

Lit. § 287. 1 Inst. 185 *b.*

By an Agreement to alien.

20. It is said in Vernon, that if a joint tenant agrees to alien, and does it not, but dies, it would be a strange decree to compel the survivor to perform the agreement.

2 Vern. 63.

Lord Hardwicke, observing on this passage, says—"If the articles were such as amounted to a severance in equity, in such case this Court would decree against the survivor."

2 Ves. 634.

ante, § 18.

21. In the case of May v. Hook, Lord Bathurst appears to have been of opinion, that this point had never been decided; but, in a modern case, Lord Alvanley, M. R., said—"A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity. I have always understood this as a settled point, and have no difficulty upon it."

2 Ves. Jun. 257.

By the Alienation of one Joint Tenant to the other.

22. An estate in joint tenancy may also be destroyed by the alienation of one joint tenant to another. The proper conveyance in this case is a release, for one joint tenant cannot enfeoff his companion, because they are both actually seised of the estate.

1 Inst. 273 *b.*

23. Thus, if there be two joint tenants in fee, and one of them releases to the other, this will destroy the joint tenancy, and vest the whole estate in the releasee, who will then hold in severalty; and the releasee shall, for many purposes, be adjudged in from the first feoffor.

Lit. § 304.

24. If there are three joint tenants, and one of them releases by deed to one of his companions, all the right which he hath in the land, the releasee has a third part of the land with himself and his companion in common; and he and his companion shall hold the remaining two parts in joint tenancy. But if one joint tenant releases to all the others, they are in from the first feoffor or grantor, and not from him who released; and they continue to hold in joint tenancy.

Bro. Ab. Joint Tenant, pl. 2.

1 Inst. 185 *a.*

25. If one joint tenant grants a rent out of his part, afterwards releases to his companion, and dies, the companion shall hold the land charged with this rent, because he comes to the estate by his own act, namely, by acceptance of the release, not by survivorship.

26. Thus, where two persons were joint tenants in fee, and one granted a rent-charge in fee, and afterwards released to the other; it was resolved, that although, to some intents, he to whom the release was made, was *in* by the first feoffor, and no degree was made between them; yet, as to the grantee of the rent-charge, he was *in* under the first joint tenant who released; and by acceptance of the release, he had deprived himself of the ways and means to avoid the charge; for the right of survivorship was the sole means to have avoided it, and that right was utterly taken away by the release. Abergavenny's Case, 6 Rep. 78 *b*.

27. Three persons being joint tenants for life, one of them sealed and delivered a deed to another, in which it was expressed, that he granted, bargained, sold, assigned, set over, and confirmed to the other, all the right, estate, title, interest, claim, and demand of the grantor, of and to the lands holden in jointure. The question was, whether this deed was sufficient to pass the part or share of the joint tenant who made the deed, to the other to whom the deed was made, or not. It was adjudged clearly, without argument, that it was. And it was said by the Chief Justice, that though the jury had found that he *granted*, yet the Court would adjudge that he released; which was the proper conveyance for one joint tenant to pass his estate to the other. Chester v. Willan, 2 Saund. 96.

28. John Stile and Susan a feme sole were joint tenants for life. Susan took husband, who by fine granted to Stile, *tenementa prædicta et totum et quicquid habent pro termino vitæ* of the said Susan; *et illa ei reddidit habendum*, to him and his assigns, for the life of the said Susan; and warranted it to him and his heirs during the life of the said Susan. The question was, whether this fine should enure by way of release, or Eustace v. Scawen, Cro. Ja. 696.

by grant of the estate, and severance of the jointure of the moiety, so that this estate should enure during the life of Susan.

It was resolved, that it should enure by way of release, and not by way of grant: and although it
Tit. 35. c. 12. was granted by fine, it as well enured by way of release, as a grant by deed; and the rather for the words *ei reddidit*, which enured by way of release: and both estates being vested in him, the law should vest that in him, as if he had it from the feoffor. And although it was objected that he had one estate from the feoffor by deed, and the other estate by the fine, so being by matter of record, he could not divide it, yet it was said that both estates being vested in him, the law should adjudge it in him, as by the first limitation.

Doderidge held, that by whatever means he came to the estate of his companion, it should enure by way of release; that he should be said in of the entire estate, as by the feoffment. Therefore if one joint tenant bargained and sold by deed enrolled to his companion, it should enure by way of release and that he should be said *in* of the entire estate, as by the feoffment. And if one joint-tenant bargained and sold by deed enrolled to his companion, although
Tit. 32. c. 9. that vested the use, and the statute vested the possession, yet, being in him, the law should construe it to be entirely in him, and by division of estate.

By voluntary Partition. Lit. § 290. 1 Inst. 169 *a.*

29. Joint tenants may destroy their estate by a voluntary partition among themselves. But such partition must, at all times, have been made by deed.

By Writ of Partition. 1 Inst. 187 *a.*

30. By the common law, one joint tenant could not compel the other to make partition; except by the custom of some particular cities and boroughs. But by the statute 31. Hen. VIII. c. 1. reciting the

inconveniences which joint tenants lay under, it is enacted, that all joint tenants of any estate or estates of their own inheritance, in their own rights, or in right of their wives, of any manors, &c. shall and may be coacted and compelled to make partition between them of all such manors, &c. as they hold as joint tenants, by writ *de partitione facienda*, in that case to be devised in Chancery.

31. As this statute only extended to joint tenants having an estate of inheritance; an act was made, 32 Hen. VIII. c. 32. by which joint tenants for life or years are enabled to make partition of their estates.

32. In this action there are two judgements; the first, *Quod partitio fiat inter partes prædictas, de tenementis, cum pertinentiis.* And upon this there goes out a judicial writ to the sheriff, to make partition; which recites, first the writ of partition and judgement, and then commands the sheriff, together with twelve men of the vicinage, &c. to go in person to the lands to be divided, and there, in presence of the parties, (if they appear on summons to be made,) by the oaths of those twelve men, to make an equal and fair partition, and allot to each party their full and just share, and then return the inquisition of the partition annexed to the writ, under the seals of the sheriff and the jurors; whose names are likewise to be returned. Booth's Real Act. 244. Lit. § 248.

33. When the inquisition is thus returned, on motion made to the Court, the second judgement is given in this manner:—*Ideo consideratum est per curiam quod partitio firma et stabilis in perpetuum teneatur.* 1 Inst. 169 *a.*

34. In a writ of partition, if the judgement be given *quod partitio fiat*, and thereupon a writ is directed to the sheriff to make partition, no writ of Berkeley v. Warwick, Cro. Eliz. 635.

error lies: because the judgement is not complete till the sheriff's return and the second judgement which the law requires; for, before that, the plaintiff may be nonsuited; or he may, upon the return of the sheriff, suggest to the Court that the partition is not equal, and so have a new partition; and may also release before the last judgement.

Cro. Eliz. 636. Dal. 59.

35. If after awarding the judicial writ, and before the return of it, the defendant dies; yet the partition is good, and the writ shall not abate: because before the death of the defendant, judgement ought to be given that partition should be made; and though, upon the return of the judicial writ, there is another judgement given, yet that is in confirmation of the first judgement. It seems likewise that upon the return of the judicial writ, no exception can be taken to it; therefore it is not material whether the defendant be dead or alive then, since he can have no advantage by any plea on the return of the writ.

Yate v. Windham, Cro. Eliz. 64.

36. If the writ be brought by one joint-tenant against several; and there happen to be error in the execution of it; and one of the defendants releases all errors to the plaintiff, this shall not bar the others; for each having a distinct interest, shall not be prejudiced by the release of his companion.

Moor v. Onslow, Cro. Eliz. 759.

37. In this writ of partition may be demanded the view of frankpledge, together with a manor; for though it be not severable of itself, nor partible, yet the profits thereof may be divided: or it may be divided thus; that the one shall have it at one time, and the other at another: also, being demanded within the manor, it may be well entirely allotted to one, and the land in recompence to another.

38. By the statute 8 & 9 Wm. III. c. 31. made perpetual by the statute 8 & 4 Ann. c. 18. § 2. reciting

that the proceedings on writs of partition were found to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, &c. to be divided; and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments, in making and establishing partitions; by reason of which, divers persons having undivided parts or purparts, were greatly oppressed and prejudiced, and the premises were frequently wasted and destroyed, or lay uncultivated or unmanured, so that the profits of the same were totally, or in a great measure lost; for remedy whereof it is enacted, "That after process of *pone*, or attachment returned upon a writ of partition, affidavit being made of due notice given of the said writ of partition, to the tenant or tenants to the action, and a copy thereof left with the occupier or tenant or tenants, or if they cannot be found, to the wife, son, or daughter of the tenant or tenants, or to the tenant in actual possession by virtue of any estate of freehold, or for term of years or uncertain interest, or at will, of the manors, &c. whereof the partition is demanded (unless the said tenant in possession be the demandant in the action), at least 40 days before the day of the return of the said *pone* or attachment; if the tenant or tenants of such writ or any of them, or the true tenant to the messuages, &c. shall not in such case, within 15 days after the return of such writ of *pone* or attachment, cause an appearance to be entered, in such court where such writ of *pone* or attachment shall be returnable; then in default of such appearance, the demandant having entered his declaration, the Court may proceed to

examine the defendant's title, and quantity of his part and purpart; and accordingly as they shall find his right, part, and purpart to be, they shall for so much give judgement by default, and award a writ to make partition, whereby such proportion, part, and purpart may be set out severally; which writ being executed, after eight days notice given to the occupier or tenant and tenants of the premises, and returned, and thereupon final judgement entered, the same shall be good and conclude all persons whatsoever, after notice as aforesaid, whatever right or title they have or may at any time claim to have in any of the manors, &c. mentioned in the said judgement and writ of partition; although all persons concerned are not named in any of the proceedings, nor the title of the tenants truly set forth."

39. By the third section of this statute, it is provided, "That if such tenant or person concerned, or either of them, against whom or their right or title such judgement by default is given, shall within the space of one year after the first judgement entered, or in case of infancy, coverture, *non sanæ memoriæ*, or absence out of the kingdom, within one year after his, her, or their return, or the determination of such inability, apply themselves to the Court by motion, where such judgement is entered, and show a good and probable matter in bar of such partition, or that the demandant hath not title to so much as he hath recovered; then in such case the Court may suspend or set aside such judgement, and admit the tenant and tenants to appear and plead, and the cause shall proceed according to due course of law, as if no such judgement had been given; and if the Court upon hearing thereof shall adjudge for the first demandant,

then the said first judgement shall stand confirmed, and be good against all persons whatsoever, except such other persons as shall be absent or disabled as aforesaid; and the person or persons so appealing shall be awarded thereupon to pay costs; or if within such time or times aforesaid, the tenants or persons concerned, admitting the demandant's title parts and purparts, shall show to the Court an inequality in the partition, the Court may award a new partition to be made, in presence of all parties concerned (if they will appear), notwithstanding the return, and filing upon record the former; which said second partition returned and filed, shall be good and firm for ever, against all persons whatever, except as before excepted."

40. By the 4th section of this statute, it is further enacted, "That no plea in abatement shall be admitted or received, in any suit for partition, nor shall the same be abated by reason of the death of any tenant."

Halton v. Thanet, infra, Tit. 20.

41. By the 5th section of this statute, the undersheriff in the presence of two justices may act for the high sheriff. "And in case such partition be made, returned, and filed, he or they that were tenant or tenants of any of the said messuages, &c. or any part or purpart thereof, before they were divided, shall be tenant or tenants for such part set out severally to the respective landlords or owners thereof, by and under the same conditions, rents, covenants, and reservations, where they are or shall be so divided; and the landlords and owners of the several parts and purparts so divided and allotted as aforesaid, shall warrant and make good unto the respective tenants the said several parts severally, after such partition,

as they were bound to do by any copy, leases, or grants, of their respective parts, before any partition made. And in case any demandant be tenant in actual possession to the tenant to the action, for his part and proportion, or any part thereof, in the messuages, &c. to be divided by virtue of a writ of partition as aforesaid, for any term of life, lives, or years, or uncertain interest, the said tenant shall stand and be possessed of the said purparts and proportions for the like term, and under the same conditions and covenants, when it is set out severally, in pursuance of this or any other act, statute, or law to that purpose *."

By Partition in Chancery.

42. The courts of common law are now seldom resorted to for obtaining partition of estates in joint tenancy. For the Court of Chancery, ever since the reign of Queen Elizabeth, has entertained suits for partition; upon the ground, that if the titles of the parties are in any degree complicated, it is extremely difficult to proceed in the courts of law: and where the tenants in possession are seised of particular estates only, the persons in remainder are not bound by the judgement.

Mitford's Plead. 1 Inst. 169 *a*. *n*. 2.

Amb. R. 236. 589.

43. A joint tenant may therefore now file a bill in the Court of Chancery, praying for a partition of the estate; in which case the Court will issue a commission to certain persons for that purpose, who may proceed to divide the estate without a jury; and make their return to the Court. If not objected to by any of the parties, the Court will decree the performance of such partition, and direct the parties to execute

Calmady v. Calmady, 2 Ves. Jun. 568.

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* Partitions may now be made under inclosure acts. Vide Tit. 20.

proper conveyances to each other of the shares allotted to them.

44. Lord Hardwicke has said, that where a bill is brought in the Court of Chancery, to have a partition between two joint tenants, or tenants in common, the plaintiff must show a title to himself in a moiety, and not allege generally that he is in possession of a moiety; and this is stricter than a partition at law, where seisin is sufficient. The reason is, because in Chancery conveyances are directed, and not a partition only; which makes it discretionary, whether where a plaintiff has a legal title, they will grant a partition or not; and where there are suspicious circumstances in the plaintiff's title, the Court will leave him to law.

Cartwright v. Pulteney, 2 Atk. 380.

45. Sir W. Blackstone says, if two joint tenants agree to part their lands, and hold them in severalty, they are no longer joint tenants; for they have no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason also the right of survivorship is, by such separation, destroyed.

By an Agreement to make Partition. 2 Comm. 185.

46. In a modern case, in which the question was, whether persons taking a residue as executors, took as joint tenants; Lord Thurlow said—"If in fact they were joint tenants, could their having joined in an answer, that it was a tenancy in common, have the operation of a severance? A note certainly would do it, because a joint tenancy may be severed by any contract: and if they said in their answer that they agreed so to do, I should construe them to have done a sufficient act to sever."

Trewen v. Relfe, 2 Bro. R. 220.

It should however be observed, that an agreement of this kind must be in writing, and would only operate

in equity; and that the legal estate would still be held in joint tenancy.

47. An agreement by the husbands of two joint tenants to make a partition, and a partition made under such agreement, will not bind the inheritance of the wives.

Ireland v. Rittle, 1 Atk. 541.

48. Mary and Susan Jackson being joint tenants in fee of certain copyhold lands, and being both married; the husbands, by mutual agreement, made a partition of the premises between themselves and the heirs of Mary and Susan, by which each of them agreed to take one part thereof, which each of them did, and entered into possession. Susan held a share of the premises so divided by virtue of such partition, and Mary enjoyed her part till her death: and Mary's share being at the time of the partition somewhat larger than Susan's, in consideration thereof Mary paid the taxes charged upon both. A bill was brought by the heir of Mary to confirm the division, and that the defendant Susan might be restrained from proceeding at law against the plaintiff, to compel a new partition thereof. Lord Hardwicke said, that where there had been a long possession under an agreement for owelty of partition, the Court was strongly inclined to quiet the enjoyment of such estates; and he was at first of opinion to establish the agreement, but it appeared that it was only an agreement between the husbands, which could by no means bind the inheritance of the two wives; for the argument of long enjoyment was of no force, unless it had been originally the agreement of the wives. His lordship further observed, that if a joint tenant, upon a partition, thought proper to accept of a contingent uncertain advantage, where one moiety of the land was of

vide Tit. 19. & 20.

superior value to the other, it would not vacate the agreement.

By devolving to one Person.

49. The last mode by which an estate in joint tenancy may be destroyed, is by the devolving of all the shares on one of the joint tenants, by survivorship; in which case he acquires an estate in severalty.

TITLE XIX.

COPARCENARY.

1. *How this Estate arises.*
3. *Properties of Coparceners.*
7. *The Possession of one is that of the other.*
10. *Subject to Curtesy and Dower.*
11. *Destroyed by Alienation.*
12. *By voluntary Partition.*
20. *By Writ of Partition.*
26. *What may be divided.*
28. *By Partition in Chancery.*
29. *Incidents after Partition.*
33. *By Descent to one of them.*

SECTION 1.

How this Estate arises.

Lit. § 241, 2.

AN estate in coparcenary arises, where a person seised of lands and tenements in fee simple, or in tail, dies leaving only daughters, sisters, aunts, or other female heirs; in which case the estate descends to all such daughters, sisters, &c. jointly; they are called coparceners, and are said to hold in coparcenary, and to make but one heir to their ancestor.

2. An estate in coparcenary also frequently arises in consequence of gavelkind and other customary descents to all the male children, in which case they are coparceners: from which Littleton says, that coparceners may be, either by common law, or by custom.

Properties of Coparceners.

1 Inst. 163 *b.* 169 *a.*

3. The properties of coparceners are in some respects like those of joint tenants; for they have the same unities of interest, title, and possession: and as they make but one heir, they have one entire freehold in the land, in respect to a stranger's *præcipe*.

4. In many other points coparceners differ materially from joint tenants. First, they always claim by descent, whereas joint tenants always claim by purchase. For Littleton says, if sisters purchase lands or tenements, they are joint tenants thereof, not coparceners. Hence it likewise follows that no estates can be held in coparcenary but such as are of a descendible nature; whereas it has been stated that estates for life and years may be held in joint tenancy. § 254.

5. No unity of time is necessary to an estate in coparcenary; for if a man has two daughters to whom his estate descends, and one dies leaving issue a son, such son and the surviving daughter, and when both the daughters are dead, their two heirs, will be coparceners, though the estates vest in them at different times. 1 Inst. 164 *a*.

6. Coparceners, though they have an unity, have not an entirety of interest, for between themselves, to many purposes, they have, in judgement of law, several freeholds. They are properly entitled, each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them; for each part descends severally to their respective heirs; though the unity of possession continues. Idem. 2 Comm. 188.

7. The possession of one coparcener is the possession of the other; the entry of one coparcener generally, is also accounted in law the entry of both, and no divesting of the moiety of the sister. But where one coparcener enters specially, claiming the whole land, and taking the whole profits, she gains one moiety, namely, that of her sister, by abatement, and yet her dying seised shall not take away the entry of her sister. The Possession of one is that of the other. 1 Inst. 243 *b*. *n*. 1. 373 *b*.

In a note to this passage, taken from Lord Nottingham's Manuscripts, it is said—"The contrary is held; that one coparcener cannot be disseised without actual ouster; and claim shall not alter the possession:" and the case of Smalls v. Dale, which will be stated in the next title, was cited.

Hob. 120.

1 Inst. 373 *b*.

8. Lord Coke says, where both copareeners are actually seised, the taking of the whole profits, or any claim made by the one, cannot put the other out of possession, without an actual putting out or disseisin; but if one coparcener enters claiming the whole, and makes a feoffment in fee, and takes back an estate to her and her heirs, and hath issue, and dies seised, this descent shall take away the entry of the other sister; because, by the feoffment, the privity of the coparcenary was destroyed.

Id. 243 *b*.

Davenport v. Tyrrell, 1 Black. R. 675.

9. In a writ of error from the Court of King's Bench in Ireland to that of England, the case was, that Maurice Tyrrell, being a Roman Catholic, died seised of certain lands, leaving two sons, Richard and James. By the Irish statute 2 Ann. estates in fee simple and fee tail, belonging to Roman Catholics, descended to all the sons, as if the lands were held in gavelkind: on the death of Maurice, his eldest son Richard entered alone, held the same for 62 years, till his death; and in the mean time settled the same by fine and recovery, to which James his brother was privy. On the death of Richard in 1766, leaving two daughters, James, the lessor of the plaintiff, brought an ejectment against his two nieces, for two thirds of the moiety of the lands, whereof his brother died seised, as coheir in gavelkind with his brother: the other third being assigned to the widow of Richard for her dower.

On the trial the Judge directed the jury to find a verdict for the plaintiff: upon which a bill of exceptions was tendered, setting out in substance this case, which was returned into the King's Bench in Ireland; and thereupon the Court gave judgement for the defendants. A writ of error was then brought in the Court of King's Bench at Westminster, and it was argued for the defendants, that sixty-two years sole possession, and the fine, were a bar to this action by the common law. That this was a question, not between joint tenants or tenants in common, but tenants in gavelkind, who were coparceners: and the true state of the law was this, 1. If both enter, there must be an actual ouster to make a disseisin. 2. If one enters generally, and takes the profits, this is no disseisin. 3. If one enters specially, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin; but after his death the other may enter, unless barred by the statute of limitations. 4. If, after a special entry, one by feoffment or fine destroys the coparcenary, and takes back an estate in fee, and dies, the entry of the other is barred. Here Richard entered alone in 1704; took the whole profits, settled the estate in 1727, with the privity of James, levied a fine, and died after having been sixty-two years in possession. The entry of James was therefore clearly barred, and he could not maintain an ejectment.

The Court said, that the statute 2 Ann. made the lands of Roman Catholics descend in gavelkind, that was its whole effect; and then the adverse possession of one gavelkind tenant would not operate as the possession of both. That was a qualified rule, and in the present case, the acts of ownership, fine, &c, Coppinger v. Keating, Tit. 20.

made an actual ouster; so that the statute of limitations barred the plaintiff.

Tit. 31. c. 2.

Subject to Curtesy and Dower.

10. Curtesy and dower are incident to estates held in coparcenary; for no survivorship takes place, as each share descends to the heir of the respective coparcener. But in such a case dower can only be assigned in common; for the widow cannot have it in a different manner from her husband.

Destroyed by Alienation. Lit. § 309.

11. Estates in coparcenary may be destroyed by the alienation of one of the coparceners to a stranger, which disunites the title, and may disunite the interest; and the lands are no longer held in coparcenary, but in common.

By voluntary Partition. § 243.

12. Estates in coparcenary may be destroyed by partition, which disunites the possession; and Littleton mentions four sorts of voluntary partitions. The first is when coparceners agree to make partition, and do make partition of the tenements, so that each takes a particular part in severalty.

1 Inst. 166 *a*.

13. Lord Coke has observed upon this section, that if coparceners make partition at full age, and unmarried, and of sane memory, of lands in fee simple, it is good and firm for ever, though the values be unequal. But if it be of lands entailed, or if any of the parceners be of nonsane memory, it shall bind the parties themselves, but not their issues, unless it be equal: if any be covert, it shall bind the husband, but not the wife, or her heirs: if any be within age, it shall not bind the infant.

Lit. § 244.

14. The second mode of voluntary partition is, where coparceners agree to choose some friend to divide the lands; in which case the eldest daughter shall choose first, and the other daughters according to their seniority.

15. The part which the eldest takes by virtue of her priority of age, is called *enitia pars*; it is a respect paid to age, and merely honorary, for it does not descend to her issue, but the next eldest sister shall have it; whereas all those privileges which the law gives to the eldest sister, that are beneficial to her, descend to her issue, and even go to her assignee. Lit. § 245.

16. The third mode of voluntary partition is, where the eldest makes the division of the lands; in which case she shall choose last: for Lord Coke says, the rule of law is, *cujus est divisio, alterius est electio*; for avoiding partiality. Idem.

17. The fourth mode of voluntary partitition is, to have the lands divided, and then the sisters to draw lots for their shares. And Lord Coke observes, that in this kind of partition, coparceners *fortunam faciunt judicem.*

18. Lord Coke also observes, that there are other partitions in deed, beside those here mentioned; for a partition between two coparceners, that the one shall have and occupy the land from Easter until the 1st of August, in severalty, and the other shall have and occupy the land from the 1st of August till Easter, yearly to them and their heirs, is a good partition. Also, if two coparceners have two manors by descent, and they make partition, that the one shall have one manor for one year, and the other the other manor for that year, and so *alternis vicibus* to them and their heirs; this is a good partition. The same law is if a partition be made for two or more years, and each coparcener has an estate of inheritance, and no chattel; albeit either of them, *alternis vicibus*, has the occupation but for a certain term of years. 1 Inst. 167 *a.*

Lit. § 250. 19. These partitions might formerly have been made by parol only, without deed, or livery; in consequence of the statute of frauds, 29 Cha. II. c. 3, no legal partition can now be made between coparceners without deed. But an agreement in writing to make a partition, will have the same effect in equity, as an actual partition at law.

Tit. 18. c. 2. § 45.

By Writ of Partition. 20. Where coparceners cannot agree upon any of the preceding modes of partition, any one or more of them may bring a writ of partition against the others; and when judgement is given upon this writ, that a partition shall be made between the parties, the sheriff and jury make a division of the lands, in the same manner as between joint tenants, not making mention in the judgement of the elder sister, more than of the younger.

Lit. § 247-8.

Tit. 18. c. 2. § 30.

1 Inst. 175 *a*. 21. At common law the writ of partition lay for one coparcener, tenant of the freehold, against the other, and against the alienee of such coparcener: but it lay not for the alienee, nor for the tenant by the curtesy. And if one coparcener had made a lease for life, she could not afterwards bring a writ of partition, during the continuance of that estate.

Idem. 22. If there were three coparceners, and the eldest purchased the part of the youngest, yet she should have a writ of partition at common law, against the middle sister; for though she had one part by purchase, yet this did not strip her of her character of a coparcener: it was a stronger case where there were three coparceners, and the eldest took a husband who purchased the share of the youngest; the husband was a stranger, and no coparcener; yet he and his wife should have a writ of partition against the middle sister, at the common law; because he was seised of one part in right of his wife, who was a parcener.

23. A tenant by the curtesy shall have a writ of partition upon the statute 32 Hen. VIII., for although he is neither joint tenant nor tenant in common, (for that a *præcipe* lies against the parcener and tenant by the curtesy) yet he is in equal mischief as another tenant for life. 1 Inst. 175 *a.*

24. The proceedings under a writ of partition are somewhat altered by the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32., and still more by the statute 8 & 9 Will. III. c. 31., all of which extend to coparceners; and have been stated in the preceding title.

25. It has been held, in a modern case, that the statutes respecting partitions do not extend to copyhold estates. Burrell v. Dodd, 3 Bos. & Pul. 378.

26. All lands and other things, which are capable of a division, must be divided upon a writ of partition, and set out by metes and bounds. Castles used for the necessary defence of the realm, or which were the heads of baronies or earldoms, were allotted to the eldest sister: but castles for habitation and private use, and houses, may be divided among coparceners. What may be divided. 1 Inst. 164 *b.* Tit. 26. c. 1.

27. There are also several kinds of incorporeal hereditaments which cannot be divided among coparceners; they were therefore allotted to the eldest sister, and the others had an allowance out of the rest of the inheritance: but where nothing else descended, then it was agreed that each should have them for a certain time.

28. Partitions between coparceners are now usually made by means of a bill in Chancery, in the same manner as partitions between joint tenants; and partitions may also be made by the commissioners in an inclosure act. By Partition in Chancery. Tit. 18. c. 2. Tit. 20.

29. Though the law gives to every coparcener a power to sever her own moiety, and to carry it to the family into which she marries; yet since the par- Incidents after Partition. 1 Inst. 173 *b.*

tition is compulsory, the law will not put coparceners in a worse condition, after partition, than if they had enjoyed their shares in coparcenary; therefore, on a suit commenced for any part, or on eviction of any part, they shall have like remedy as if they had enjoyed in common; in which case, if a suit had been commenced, both parties must have been impleaded; and on a recovery, there had been an equal loss to both.

Idem. Tit. 32. c. 24.

30. There is, therefore, after partition a warranty annexed to each part; so that if either be impleaded, she may vouch her sister; and if she loses, she may recover one moiety of her loss in value against the other sister. For there is a condition annexed to every partition, that if either the whole, or any share, or an estate for life, or in tail thereout, be evicted, the party so evicted may enter on her sister's moiety, and avoid the partition of an undivided moiety of what is left.

Lit. § 251, 2.

31. If two houses descend to two coparceners, one worth twenty shillings a year, and the other only worth ten shillings a year, each coparcener upon a partition shall have a house; but she who has the house worth twenty shillings a year shall pay to the other, and her heirs, five shillings a year, that the partition may be equal; and distress may be of common right, into whose hands soever the house goes.

1 Inst. 169 *b*.

32. This kind of rent is called a rent for owelty or equality of partition, and might formerly have been granted without deed; and where a rent of this kind is granted generally, it shall issue out of the grantor's share, and shall go in coparcenary.

By Descent to one of them.

33. Estates in coparcenary are also destroyed by the whole at last descending to, and vesting in one single person, which brings it to an estate in severalty.

TITLE XX.

TENANCY IN COMMON.

1. *Description of.*
3. *How created.*
8. *Incidents to this Estate.*
14. *The Possession of one is that of the other.*
21. *Subject to Curtesy.*
23. *And to Dower.*
25. *Destroyed by a voluntary Partition.*
26. *By Writ of Partition.*
28. *By Partition in Chancery.*
33. *By Partition under an Inclosure Act.*
34. *By uniting all the Titles.*

SECTION 1.

A TENANCY in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life or years, by several titles; not by a joint title, and occupy the same lands or tenements in common; from which circumstance they are called tenants in common, and their estate a tenancy in common. Description of. Lit. § 292. 1 Inst. 190 *b.*

2. The only unity required between tenants in common is that of possession. For one tenant in common may hold his part in fee simple, the other in tail, or for life; so that there is no unity of interest. One may hold by descent, the other by purchase; or the one by purchase from one person, and the other by purchase from another; so that there is no unity of title. One's estate may have been vested fifty years, the other but yesterday; so that there is no unity of time. 2 Comm. 191.

3. A tenancy in common may be created by the destruction of an estate in joint tenancy or coparcenary. Thus, Littleton says, if a man enfeoffs two How created. § 292—299.

joint tenants in fee, and one of them enfeoffs a stranger of his share, the alienee and the other joint tenant are tenants in common.

Id. 309. 4. So, if two persons have an estate in coparcenary, and one of them alienes his share to a stranger, the alienee and the other coparcener become tenants in common.

Tit. 18. c. 1. § 8. 5. It has been stated in a preceding title, that where lands are given to two men, and the heirs of their bodies, they have a joint estate for their lives, and several inheritances; so that they are joint tenants for life, and tenants in common in tail, of the inheritance.

1 Inst. 190 *a*. 6. If lands be given to John, Bishop of Norwich and his successors, and to John Overall, Doctor of Divinity, and his heirs, being one and the same person, he is tenant in common with himself.

7. A tenancy in common may also be created by express limitation in a deed or will, of which an account will be given hereafter. Tit. 32 & 38.

Incidents to this Estate. 8. Tenancies in common descend to the heirs of each of the tenants, because they have several freeholds, and not an entirety of interest, like joint tenants; therefore, there is no survivorship between them.

9. By the old law, tenants in common had no remedy against each other for the rents of the estate; but by the statute 4 and 5 Ann. c. 16. § 27. actions of account are maintainable by tenants in common against each other, in the same manner as by joint tenants; and by the statute of Westm. 2. c. 22. they have the same remedies against each other, in cases of waste, as joint tenants. Tit. 18. c. 1. § 65, 6.

1 Inst. 200 *a*. 10. If two tenants in common be of a dove house, and the one destroy the old doves, whereby the flight

is wholly lost, the other tenant in common shall have an action of trespass; for the whole flight is destroyed: therefore he cannot in bar plead tenancy in common. So it is if two tenants in common be of a park, and one destroys all the deer, an action of trespass lies.

11. It was held in Trin. 6 Eliz. by Dyer and Weston, that if there be two tenants in common of a wood, and the one leases his part to the other for years, if the lessee cuts down trees and does waste, he will be punished for a moiety of the waste, and the lessor may recover a moiety of the place wasted. Moo. 71. pl. 194.

12. One tenant in common cannot, however, maintain an action on the case, in the nature of waste, against another tenant in common, in possession of the whole, under a demise of his companion's moiety, for cutting down trees of a proper age and growth for being cut.

13. In an action on the case, in the nature of waste, it appeared that the plaintiff and defendant were tenants in common of land, on which were several trees growing; that the defendant occupied the whole, having a demise from the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age to be cut down. Martyn v. Knowllys, 8 Term R. 145.

For the defendant, it was objected, that under these circumstances this action for misfeasance could not be supported; for that the case must be considered in the same light as if the plaintiff had not leased his moiety to the defendant; the trees, as part of the inheritance, not passing by that lease. And if so, that one tenant in common could not bring such an action against another, unless for some injury done to the inheritance, which was not pretended here, as all the trees were proper for being cut, that

if the defendant could not cut trees in this state, one obstinate tenant in common might prevent the others from taking the produce of the land.

For the plaintiff it was contended, that the defendant ceased to be tenant in common during the lease, and became liable to the plaintiff, like any other lessee. That even if no lease had been granted by the plaintiff to the defendant, the former might maintain this action on the authority of Moor, 71. pl. 194., and Waterman v. Soper.

On the part of the defendant it was answered, that in the two cases cited, it was taken for granted that waste had been committed; which was not the case here. In Moor it was stated, that the lessee cut trees *and* did waste; that the instance put in Lord Raymond was, the destruction of the *whole* flight of pigeons.

The Judge directed a verdict to be taken for the plaintiff, for the value of half the trees, with leave for the defendant to set it aside, if the Court should be of opinion that the action could not be maintained.

On a motion to enter a verdict for the defendant, Lord Kenyon said, the verdict had neither principle nor authority for its support. The defendant could not be in a worse situation, by being tenant to the plaintiff of his moiety, than he would have been in, if the plaintiff had not demised to him; and, considered in that point of view, the action could not be supported. This was an action *ex delicto*: if one tenant in common misused that which he had in common with another, he was answerable to the other, in an action, as for misfeasance. But here it did not appear that the defendant committed any thing like waste: no injury was done to the inheritance, no timber was improperly felled; the defendant only

cut those trees that were fit to be cut; and if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the other's taking the fair profits of the estate. In another form of action the plaintiff would be entitled to recover a moiety of the value of the trees that were cut. Verdict for the defendant.

14. The possession and seisin of one tenant in common is the possession and seisin of the other, because such possession is not adverse to the right of his companion, but in support of their common title. Lord Coke says, although one tenant in common take the whole profits, this does not devest the possession of his companion; but if one tenant in common drives the cattle of his companion off the land, or prevents him from entering upon and occupying the land, this will devest the possession, so as to entitle the companion to bring an ejectment.

The Possession of one is that of the other.

1 Inst. 199 *b.* Cro. Eliz. 641. Sterling v. Penlington, infra, § 22.

15. Lord Hobart reports it to have been laid down by the Court of Common Pleas, in 12 James, that the entry of one tenant in common might be in three ways; either in the name of herself or her fellow; or generally, which shall always be taken according to right, as being under construction of law, and therefore lawful; or, lastly, entry claiming all expressly; which cannot dispossess her fellow; for her possession is over all lawful, as well before as after such claim; so that there is no possession altered by such claim. Then a sole claim without more, can never change the possession; and without a change of possession, it remains as before. From which it follows, that a tenant in common can never be disseised by his fellow, but by an actual ouster.

Smales v. Dale, Hob. 120.

1 Salk. 392. 2 — 423.

16. One tenant in common received all the rents for 26 years: in an ejectment brought by the other

Fairclaim v. Shackleton, 5 Burr. 2604.

tenant in common, for the recovery of his moiety, the question was, whether this possession of 26 years amounted to an expulsion of the companion, so as to devest his estate.

It was said, that tenants in common, as well as joint tenants and coparceners, have a joint possession, and the possession of one is the possession of both; that the perception of the profits did not amount to an expulsion. One tenant in common might, indeed, disseise another; but then it must be done by an actual disseisin, and not by a bare perception of the profits only.

The Court was of opinion that there was no adverse possession, no keeping the plaintiff out of possession; one tenant in common had received the rent, and not accounted for it to the other; but there was no expulsion, no ouster.

17. Notwithstanding the principle established in the preceding case, it has since been determined that 36 years sole and uninterrupted possession by one tenant in common, without any account or demand made, or claim set up by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant.

Doe v. Prosser, Cowp. 217.

18. Upon a rule to show cause why a new trial should not be granted, Lord Mansfield reported, that from the year 1734, one tenant in common had been in the sole possession of the lands, without any claim or demand by any person or persons claiming under the other tenant in common. That no actual ouster was proved; but upon the circumstances, he had left it to the jury to say, whether there was not sufficient evidence before them to presume an actual ouster; and supposing there was an actual ouster, in that case the lessors of the plaintiff were barred. The

jury found there was sufficient evidence to presume an actual ouster.

After the case had been argued, Lord Mansfield said—"It is very true that I told the jury they were warranted by the length of time in this case, to presume an adverse possession and ouster, by one of the tenants in common, of his companion; and I am still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*, as if it meant some act accompanied with real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by rightful possession, and yet hold over adversely, without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster. For instance, length of possession during a particular estate, as a term for 1,000 years, or under a lease for lives, as long as the lives are in being, gives no title; but if tenant *pour auter vie* hold over for 20 years, after the death of *cestui que vie*, such holding over will, in ejectment, be a complete bar to the remainder-man or reversioner, because it was adverse to his title. So in the case of tenants in common, the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him to be co-tenant. Nor, indeed, is a refusal to pay of itself sufficient, without denying his title; but if upon demand by the co-tenant of his moiety, the other denies to pay, and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough. The question then is, whether the possession in this case, after the particular estate

ended, was a possession as tenant in common, *eo nomine*, or adverse.

It is a possession of near 40 years, which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper, namely, six years; but in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgement of the title in them, or in those under whom they would now set up a right; therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession, for such a length of time, is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing."

The other Judges concurred, and the rule for a new trial was discharged.

19. It was determined, in the following modern case, that where one tenant in common levied a fine of the whole estate, and took the rents and profits afterwards, without account, for nearly five years, this was no evidence whence a jury should be directed, against the justice of the case, to find an ouster of his companion at the time of the fine levied.

Peaceable v. Read, East. 568.

20. Philip Fincher being tenant for life, remainder to his first and other sons in tail, remainder to all his daughters as tenants in common, in tail, (who afterwards levied a fine), died, leaving three daughters: Mary married to Thomas Hornblower, Ann married to Nicholas Pearsall, and Margaret, who died unmarried before her sister Mary. Mrs. Hornblower, under her marriage settlement, having a power to dispose of her share, executed it in favour of the right heirs of her husband, with a power of revocation. She

survived her husband, and died in March 1796. The lessor of the plaintiff claimed as heir at law of her husband, under her appointment. After her death N. Pearsall and Ann his wife levied a fine of the whole estate as of Easter term 1796. It was understood, before the trial, that the defendants meant to claim under a deed or will, or both, of Mrs. Hornblower, executed subsequent to the deed of appointment before mentioned; in consequence of which the plaintiff's counsel produced evidence by anticipation, which went decidedly to prove that at the time, and long before, when the supposed instrument bore date, Mrs. Hornblower was insane; whereupon the defendant's counsel, saying they were not then prepared to meet that case, stood upon their title, derived from the fine, operating upon what they contended was an adverse possession, by Pearsall and his wife, of the whole estate, at the time of the fine levied; as to which it appeared in evidence, that since the death of Mrs. Hornblower, and till Pearsall's death, the latter alone received the whole rent; and that no rent was ever paid to the lessor of the plaintiff; and no entry was proved to be made by him.

For the lessor of the plaintiff it was insisted at the trial, that no entry was necessary to avoid the fine, he having been tenant in common with Pearsall during his life. That he might elect whether the receipt of rent by Pearsall should be an ouster or not; and if he were not ousted, the fine would only operate on the title and interest of the defendants. Tit. 35. c. 13.

On the other side it was insisted, that as the lessor of the plaintiff was never in possession, this case was distinguishable from the common one, where several tenants in common being in possession, one of them levies a fine of the whole; and that here the posses-

sion being adverse from the death of Mrs. Hornblower, and no entry having been made, the fine was a bar to the plaintiff's recovery.

The jury, under the Judge's direction, found a verdict for the plaintiff, and leave was given to the defendant to enter a nonsuit, if the Court should be of opinion that an entry was necessary, to avoid the fine.

Lord Kenyon.—The whole of the defence is founded in a most unrighteous and fraudulent proceeding; and in order to give effect to it, the legal operation of the fine is insisted on; and it is asked, if this were not an adverse possession by Pearsall, at the time of the fine levied, where the line was to be drawn. He said he had no hesitation in saying where the line of adverse possession began, and where it ended. *Primâ facie* the possession of one tenant in common was that of the other, and every case and *dictum* in the books was to that effect. But it might be shown that one of them had been in possession, and had received the rents and profits to his own use, without account to the other, and that the other had acquiesced in this for such a length of time, as might induce a jury, under all the circumstances, to presume an actual ouster of his companion, and there the line of presumption ended. In the case of Doe v. Prosser, Lord Mansfield rightly said, it was not necessary to show actual force, in order to prove an ouster, as by turning a man out by the shoulders; but, as was also observed by Mr. Justice Aston, it might be inferred from circumstances, which circumstances were matter of evidence to be left to a jury. There, there was an undisturbed and exclusive possession by one tenant in common for 40 years, which the Court properly held to be sufficient evidence of an ouster, to leave to a jury; but no judge could think himself warranted

ante, § 18.

in directing a jury to make such a presumption in this case, in order to work the grossest injustice, and in aid of fraud. What was the case here? During Mrs. Hornblower's life, Pearsall held as tenant in common with her; he received all the rent, but he accounted for her proportion. She died in the month of March 1796, the defendants or Pearsall having, as was supposed, procured from her, at a time when the jury had found her to be insane, an instrument conveying the property to them. Then in Easter term following, for the purpose of securing the possession of this ill-gotten property, the fine was levied. But Pearsall had then done no act which manifested that he held the possession of the whole adversely: the levying a fine of the whole was no ouster of his companion. About a month intervened between the death of Mrs. Hornblower and the levying of the fine. What notice was there to the lessor of the plaintiff at that time that Pearsall had acted adversely, so that he should be taken to have acquiesced in his title. All the cases mentioned went upon the ground of acquiescence in an adverse holding, in order to presume an ouster. In Fairclaim v. Shackleton there had been a perception of the rent by one tenant in common for 26 years; but the title of the other being admitted, no ouster was presumed: without an ouster was found by the jury, the possession of one tenant in common must be taken to be the possession of all. He admitted that upon the principle of the case of Lade v. Holford, the jury might from circumstances presume an ouster; and where the fact was so found, the legal consequences would ensue; but no judge would advise a jury to make the presumption in this case. Then unless the holding were adverse, there was no occasion for an entry to avoid the fine. Suppose a tenant for

ante, § 16.

Tit. 12. c. 2.

Tit. 35. c. 13. years levied a fine, no entry by the landlord would be necessary in order to enable him to maintain an ejectment at the end of the term. In Taylor v. Horde, 1 Burr. 111. Lord Mansfield said, that in order to advance justice he would enable the real owner in such a case to consider himself kept out by wrong or not, at his election. So a tenant in common might rely on the possession of his co-tenant, as his own, unless there were an actual ouster in fact, or the jury found it from circumstances; but nothing of that sort was here found; and therefore the Court might consider the levying of the fine as rightfully and legally done, and intended to operate only on that share of the premises to which the defendants were lawfully entitled.

Mr. Justice Lawrence cited the case of Coppinger v. Keating, on a writ of error from Ireland, Mich. 22 Geo. III. where one of two brothers, professing the catholic religion, entered on the death of his elder brother on the lands, of which they were tenants in common, in consequence of the gavel act; which enacted that the lands of persons of that persuasion should descend to all the males, according to the custom of gavelkind; and held them for several years until his death; and the Court determined that the son of the elder brother was not barred by the statute of limitations; as the uncle was tenant in common with him under that act, no actual ouster being found.—The rule was made absolute for entering a nonsuit.

Subject to Curtesy.

21. Estates held in common are subject to curtesy: therefore if a woman tenant in fee or in tail, of an estate held in common with another, marries, has issue, and dies, her husband will be entitled to her estate as tenant by the curtesy, and the seisin of one

tenant in common will be considered as the seisin of the other, for this purpose.

22. A. died leaving a wife, a son, and a daughter. The widow entered upon the estate, and was seised as tenant in dower of one part, as tenant in common with her son of another part, and of a third as guardian in socage to him. The son went beyond sea, and died there under age, whereby the daughter became entitled to his share. She during her infancy married the plaintiff, and, together with him, applied to the mother to be let into possession of the son's part, which the mother refused, imagining the son was still alive, and therefore insisted to hold the land for him. Upon this they filed a bill in Chancery for an account, which was accordingly directed. After this the daughter died; and upon farther application to the Court by the husband, one question was, whether the seisin of the mother, after the son's death, being tenant in common with the daughter, was the seisin of the daughter, sufficient to make the husband tenant by the curtesy of her part. Sterling v. Penlington, 14 Vin. Ab. 511.

The Court held it was sufficient; for the entry and possession of one tenant in common was the entry and possession of the other: accordingly it was decreed for the plaintiff. And it was said, that where one entered claiming the whole for himself, in exclusion of his companion, this might not serve as the entry of his companion, being made directly against him; but that was not this case. For it appeared that the mother's keeping possession of the whole against her daughter and her husband, was entirely owing to a mistake, in imagining her son was still living; not with an intent to exclude the daughter from her right; therefore no inference could be drawn from it.

And to Dower.

23. Estates held in common are also subject to dower.

Sutton v. Rolfe, 3 Lev. 84.

Thus where in a writ of dower by a widow against the heir of her husband, the tenant pleaded that A. was seised, and devised the tenements to the husband, and two more, equally to be divided; by which they were tenants in common; and so demands judgement of the writ, supposing that the widow could not sue dower, before partition, against tenants in common. But, upon demurrer, it was adjudged that the writ well lay.

1 Inst. 34 *b.* 37 *b.*

24. In a case of this kind dower must be assigned in common; for the widow cannot have it otherwise than her husband had it.

Destroyed by voluntary Partition.

25. A tenancy in common may be destroyed by a voluntary partition of the several shares, formerly this might have been done without deed; provided it was executed in severalty by livery. In consequence of the statute of frauds, 29 Cha. II. c. 3. no legal partition can now be made between tenants in common without deed. But an agreement in writing to make partition will have the same effect, in equity, as an actual partition at law.

By Writ of Partition.

26. Tenants in common are compellable to sever their estates by writ of partition under the statutes

Tit. 18. c. 2. § 30.

31 & 32 Hen. VIII. and 8 & 9 Will. III. c. 31. which have been already stated.

Halton v. Thanet, 2 Black. R. 1134—1159.

27. In a writ of partition, a rule to show cause was granted, and afterwards made absolute, on affidavit of service, for the Court to proceed to examine the title of the defendant; process having been duly returned, the declaration entered, and no appearance entered by the tenant within ten days. The Court, on making the rule absolute, appointed to proceed on

the examination in open court on the next day. Accordingly Serj. Walker for the demandant opened his title, of which abstracts had previously been left with the judges, it fortunately proved not to be very intricate. The several seisins, descents, devises, and conveyances were proved by affidavits. The deeds and wills were produced and read; and no counsel appearing for the tenant, the Earl of Thanet, judgement on his default was given for the demandant, to hold in severalty the premises demanded in his count; in some of which he was seised of two undivided third parts, and in others of a moiety only, in common with Lord Thanet. A writ of partition was awarded.

In a subsequent term the sheriff returned that he had executed the same, in the presence of persons who attended for the plaintiff and defendant respectively; and specified in his return the several parcels, with their metes and boundaries: hereupon Walker for the plaintiff moved for final judgement, *quod partitio sit stabilis.* The rule for which was made absolute the last day of the term, on affidavit of notice to the defendant, and tenants in possession.

It has been lately held, that the statute 8 & 9 Will. III. c. 31. applies only to those cases where the tenant does not appear. Dyer v. Bullock, 1 Bos. & Pul. 344.

28. Partitions of estates held in common are now usually made by a commission out of Chancery, in the same manner as partitions of joint tenancies; in such case it is not necessary that every part of the estate should be divided; for it is sufficient if each tenant in common have an equal share of the whole. By Partition in Chancery, Tit. 18. c. 2. § 42.

29. A partition was decreed of an estate, which consisted, among other things, of a great house and Clarendon v. Hornby, 1 P. Wms. 446.

park. The defendant insisted to have one third of the house, and also a third of the park, assigned to him by the commissioners, who were to make the partition. It was urged for him, that as he was entitled to a third of the whole, so consequently he was to have a third of the house and park; and in many cases in the law, things entire in their nature, as a house, a mill, or an advowson, might be divided. So a tenant in common should have half the house, every other toll dish, and every other turn of the church, &c. That thus it would be at law, in case of a writ of partition, and equity followed the law.

Lord Parker said,—Care must be taken that the defendant should have one third part in value of the estate; but there was no colour of reason that any part of the estate should be lessened in value, in order that the defendant should have one third of it. Now if the defendant should have one third of the house and park, this would very much lessen the value of both. If there were three houses of different value to be divided among three, it would not be right to divide every house, for that would be to spoil every house. But some recompence was to be made, either by a sum of money, or rent for owelty of partition, to those who had the houses of less value. It was true, if there were but one house, or mill, or advowson, to be divided, then that entire thing must be divided in manner as the other side contended; *secus* when there were other lands, which might make up the defendant's share. Therefore, since the plaintiff and his wife had two thirds, he recommended that the house and park should be allowed to them; and that a liberal allowance out of the rest of the

estate should be made to the defendant, in lieu of his share of the house and park.

30. Where an infant is tenant in common with an adult, and a partition of the estate is directed by the Court of Chancery; the conveyances to be made in pursuance of the partition, are respited, till the infant comes of age.

31. Sir George Strode devised divers manors, &c. to trustees and their heirs, in trust for his two granddaughters, Lady Hertford and Lady Brook. On a bill for a partition, Lord King said—"Decree a partition, and for that purpose let a commission issue to allot one moiety in severalty to the plaintiff, the Lord Brook, and the other moiety in severalty to Lady Hertford, to hold to them according to their respective estates, which they are entitled to under the will: and let the plaintiff and the defendant, the Lady Hertford, be respectively quieted in the possession of the premises severally to be allotted as aforesaid: but for as much as the infant plaintiff cannot join in a conveyance of the moiety to the Lady Hertford, so that there cannot be mutual conveyances, let the conveyances to be made by the trustees of the legal estate be respited, until the infant plaintiff comes to twenty-one, or farther order of the Court; at which time all parties interested may join in mutual conveyances." Brook v. Hertford, 2 P. Wms. 518.

32. On a bill by a tenant in common for a partition against a tenant for life, and an infant tenant in tail in remainder of the other moiety; the usual decree for partition to hold and enjoy in severalty, and for mutual conveyances, was made. But day was given to the infant, till after he came of age, to show cause against the decree. Tuckfield v. Buller, Amb. 197.

On a motion made by the plaintiff to respite the execution of the conveyance till the infant came of age; the question was, whether the plaintiff was obliged to convey till the infant came of age; because he could not have a conveyance from him till that time.

Sir J. Strange, M. R. was of opinion, that the conveyance by the plaintiff ought to be made immediately, according to the decree; and took a distinction between this case and that of Brook v. Hertford. In that case the bill for partition was brought by the infant; in this, it was by an adult, against an infant; but at the importunity of counsel, leave was given to move it again before the Lord Chancellor, who declared his opinion that the conveyance ought to be mutual, not only as to the thing, but also in point of time; and said that the case of Brook v. Hertford, though different in some circumstances, was a considerable authority; and ordered the conveyance by the plaintiff to be respited.

ante, § 31.

Baring v. Nash, 1 Ves. & B. 551.

By Partition under an Inclosure Act.

33. By the statute 41 Geo. 3. c. 109. § 16. it is enacted, that it shall be lawful for the commissioners in inclosure acts, upon the request in writing of any joint tenants, coparceners, or tenants in common, or any or either of them, or of the husbands, guardians, trustees, committees, or attornies of such as are under coverture, minors, lunatics, or under any other incapacity, or absent beyond seas, to make partition and division of the estates and allotments, to such of the said owners or proprietors who shall be entitled to the same as joint tenants, coparceners, or tenants in common; and to allot the same accordingly, in severalty.

34. The last manner in which estates in common may be dissolved, is, by uniting all the titles in one tenant, by purchase or otherwise; which brings the whole to one estate in severalty. By uniting all the Titles.

END OF THE SECOND VOLUME.

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